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In The

Supreme Court of the United States

October Term, 1994

MICHAEL MAUK and
SYLVIA MAUK,

Petitioners,

v.

DAVID A. ENGLE, Director of the
Washington County Department
of Social Services,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Special Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the removal of an African American foster child from a white foster home by the Washington County Department of Social Services, solely on the basis of race and contrary to the best interests of the child, constitutes a violation of the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment.

2. Whether the Director of the Washington County Department of Social Services' refusal to consent to the adoption of an African American foster child by white foster parents solely on the basis of race constitutes a violation of the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment.

3. Whether white foster parents, as individuals, taxpayers, and as next friend of an African American foster child have a constitutionally protected liberty interest in issues of foster care placement in their home and their right to adopt foster children in their care under the Due Process Clause of the Fourteenth Amendment to the Constitution.

4. Whether an African American foster child has a constitutionally protected liberty interest in issues relative to her foster care placement and/or subsequent adoption under the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES

The parties to the proceedings below include Petitioners, Michael and Sylvia Mauk, and Respondent, David A. Engle, Director of the Washington County Department of Social Services. While the Mauks brought their civil rights action on behalf of Tiffany R., Alex Bognar, Esquire, of Hagerstown, Maryland, was appointed by the Circuit Court for Washington County, Maryland, to represent Tiffany R. in the adoption action. While John and Frances S. participated in all of the proceedings below, it appears that they were not parties to the actions below.

Tiffany R. and John and Frances S. have had their last names redacted in all appellate proceedings to preserve their confidentiality as required by Rule 8-121, Md. Rules Proc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Michael and Sylvia Mauk, individually, as next friend of a child designated for the purposes of this appeal as Tiffany R.[1] and as taxpayers of the United States and the State of Maryland (hereinafter collectively referred to as "the Mauks") respectfully petition for a Writ of Certiorari to review the judgment of the Court of

[1] While the lower court's decree changed the child's name to Tiffany S., Petitioners will refer to her as Tiffany R., as that is how her name appears throughout the record.

Special Appeals of Maryland (hereinafter referred to as the "Court of Special Appeals") in these cases.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (hereinafter the "Court of Appeals") (App. *infra.*, 34) is reported at 337 Md. 438, 654 A.2d 447 (1995). The opinion of the Court of Special Appeals (App. *infra.*, 1-33), is reported at 101 Md. App. 274, 646 A.2d 1036 (1994). The opinions of the Circuit Court for Washington County, Maryland (App. *infra.*, 50-76) are unreported.

JURISDICTION

The Court of Special Appeals entered its judgment on September 2, 1994 (App. *infra.*, 1). A timely Petition for Writ of Certiorari was filed in the Court of Appeals and subsequently denied by Order dated February 16, 1995. (App. *infra.*, 34). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988:

In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Md. Code Ann., Fam. Law § 5-311(b)(2):

The executive head of the child placement agency may not withhold consent [to adoption] for the sole reason that the race or religion of the prospective adoptive parents is different from that of the individual to be adopted or of the birth parents, where to do so would be contrary to the best interests of the child.

Md. Code Ann., Fam. Law § 5-525(c):

In developing a permanency plan that is in the best interests of a child under foster care, the local department shall consider the following order of priority:

(3) adoption in the following descending order of priority:
(i) by a current foster parent with whom the child has resided continually for at least

the 12 months prior to developing the permanency plan or for a sufficient length of time to have established positive relationships and family ties; or

STATEMENT OF THE CASE

A. Factual Background

This action arises out of the Mauks' efforts to adopt a child whom they love, but who is not of their race, and with whom they have developed a strong bond by virtue of their care for the child as foster parents during a substantial part of the child's early development. Michael and Sylvia Mauk, husband and wife, are residents of Washington County, Maryland. The Mauks are white. The Mauk home is licensed as a foster care home and adoptive care home by the Washington County Department of Social Services (hereinafter the "WCDSS"). The Mauks have been licensed foster care providers since November, 1988. The Mauks had previously adopted a four year old black female child (Janae) and a four year old bi-racial male child (Dustin) who were foster children in their care.[2] The Mauks cannot have children of their own.

Tiffany R., a black female, was born on January 1, 1990, at the Washington County Hospital in Hagerstown, Maryland. At the time of her birth, Tiffany R. was

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[2] A representative of the WCDSS testified that had a black family wanted this black foster child, the Mauks would not have been permitted to adopt her. Apparently, the Mauks were permitted to adopt the bi-racial child because no one wanted him.

addicted to cocaine as a result of her biological mother's drug abuse. Tiffany R. also had been the victim of sexual abuse. In July, 1990, Tiffany R. was removed from her biological mother and taken into custody by the WCDSS, along with her two biological brothers who were born in 1984 and 1985, respectively. Tiffany R. was placed in the Mauk home, her one biological brother was placed with a former school teacher, and the other biological brother was placed with John and Frances S. When Tiffany R. entered the Mauk home in July of 1990, she was developmentally far below her chronological age. After one (1) year in the care of the Mauks, Tiffany R. had reached normal development for a child of her age. The child's pediatrician described this transformation as miraculous and attributed it to the care and attention which Tiffany R. received from the Mauks while in their care. Tiffany R. developed a strong bond with the Mauks and a strong sibling relationship with the Mauks' adopted children, especially with Janae.[3]

In July, 1991, the WCDSS determined that the long term plan for Tiffany R. should be placement for adoption. On November 5, 1991, WCDSS, in a secret meeting, made a determination to place Tiffany R. with John and Frances S., a black foster family, for the purposes of adoption.[4] WCDSS also determined at that time that the

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[3] Barbara DiCocco, a court appointed social worker, testified in May 1993 that at that time, the strongest attachment between Tiffany R. and any member of either family was Tiffany R.'s sibling attachment to Janae Mauk.

[4] Perhaps it is no coincidence that WCDSS's decision to remove Tiffany R. from the Mauk home came shortly after the Department became aware that Tiffany was "normal".

Mauks would not be appropriate adoptive parents for Tiffany R.[5] WCDSS consulted no outside professionals in making the determination to remove Tiffany R. from the Mauk home and to place her with John and Frances S. for adoption. John and Frances S. had not previously expressed an interest in adopting Tiffany R., however, the Mauks had. WCDSS admitted to using race in their decision, but were unable to explain how race was used or to quantify what weight it was given.

On or about March 16, 1992, the Mauks were informed for the first time that WCDSS had decided that Tiffany R. should be removed from their home and placed in a black foster home. The primary reason given to the Mauks for the removal of Tiffany R. from their home was race, in that Tiffany R. is black and the Mauks are white. The only other explanation given to the Mauks at that time was that WCDSS wished to reunite Tiffany R. with her two older brothers, who had by then been placed together in the home of John and Frances S. After the Mauks informed the WCDSS that they intended to challenge the removal of Tiffany R., WCDSS provided additional reasons for the decision to remove Tiffany R. from the Mauk home, none of which were substantiated or

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[5] Curiously, the Mauks were found to be the appropriate adoptive parents for their bi-racial son four months prior to this determination.

communicated to the Mauks previously.[6] Tiffany R. was removed from the Mauk home on March 31, 1992.

B. Proceedings Below

1. How the Federal Question was Raised

David A. Engle, Director of WCDSS (hereinafter "Engle") was appointed the guardian of Tiffany R., with the right to consent to adoption in Adoption Docket A-2633 (hereinafter the "adoption action"). After Engle illegally removed Tiffany R. from their home, the Mauks moved to intervene into the adoption action, at which time the federal questions for which the Mauks now seek review were first raised. The Mauks' Motion was subsequently granted by the Circuit Court for Washington County, Maryland (hereinafter the "Circuit Court").[7] The Mauks filed a Counter-Complaint against Engle in the

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[6] WCDSS cautioned the Mauks that if they challenged WCDSS, their foster home would be considered closed and they would receive no additional foster children. With one exception, no foster children have been placed with the Mauks since Tiffany R.'s removal in 1992. In April, 1994, the Mauks agreed to care for a *white* infant who suffered from asthma and required frequent respiratory therapy, at the request of the infant's grandmother, an acquaintance of the Mauks, and the child's mother. The child was under the jurisdiction of WCDSS. WCDSS initially sought to remove the child from the Mauks' care, however, upon the vehement insistence of the child's mother and grandmother, the child was permitted to stay with the Mauks.

[7] The Circuit Court, in ruling on the Mauks' Motion to Intervene, stated that " . . . the Mauks have standing to challenge the constitutionality of the Department of Social Services' policy based on Maryland law and the Maryland Constitution and the United States Constitution." (App. *infra.*, 36)

Adoption Action pursuant to 42 U.S.C. § 1983, as well as a Verified Petition for Adoption. On August 5, 1992, Engle moved to dismiss the Mauks Counter-Complaint and a hearing was held on September 10, 1992 on Engle's Motion.[8] Engle subsequently filed an Answer to the Mauks' Petition for Adoption, in which he essentially admitted the allegations contained in the Petition, but requested that the Mauks' prayer for relief be denied.

On August 31, 1992, after an evidentiary hearing at which it heard testimony from numerous fact witnesses, including the WCDSS officials responsible for the removal, and experts, the Circuit Court issued its findings of fact that the removal of Tiffany R. from the Mauk home was solely on the basis of race, and that the other reasons advanced by Engle were pretextural. Moreover, the Circuit Court found that the decision to remove Tiffany R. from the Mauk home was not in Tiffany R.'s best interest. (App. *infra.*, 49).

On January 6, 1993, the Circuit Court dismissed the Mauks' Civil Rights claims from the adoption action without prejudice and ordered that the claims be brought as a separate case. On January 21, 1993, the Mauks filed a Complaint for Declaratory, Injunctive and other relief pursuant to 42 U.S.C. § 1983 against Engle in the Circuit Court. Engle subsequently filed a Motion to Dismiss or, in the Alternative, to Stay Proceedings. The Mauks responded to and opposed Engle's Motion and, at the same time, filed a Motion for Partial Summary Judgment.

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[8] The issues before the Circuit Court were essentially the same as those presented in an argument heard on April 27, 1993.

The Mauks' Motion for Partial Summary Judgment was based on the Circuit Court's findings of fact, in the adoption action, that the removal of the child from their home solely on the basis of race and contrary to the best interests of the child violated, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as a matter of law.

2. Disposition in the Circuit Court

After argument on April 27, 1993, the Circuit Court dismissed the Mauks' civil rights claims, with prejudice, because the trial judge found that neither the Mauks nor Tiffany R. had a constitutionally protected liberty interest.[9] The Circuit Court also ruled that the Mauks' Motion for Partial Summary Judgment was moot. On May 6, 1993, the Circuit Court denied the Mauks' Petition for Adoption and entered a Decree of Adoption in favor of John and Frances S., a black family.[10] At the conclusion of the adoption action, the trial court announced its final findings of fact with regard to the removal of the child from the Mauk home by WCDSS. The trial court characterized the treatment of the Mauks as a "grave injustice" and reiterated its finding that the reasons advanced by

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[9] The trial judge announced his decision at the conclusion of the oral argument on April 27, 1993 and requested that Engle's counsel prepare a written Order. The Court did not sign a written Order until May 25, 1993.

[10] While the Decree of Adoption recites that the Circuit Court had read and considered a Petition for Adoption, Affidavit and Exhibits filed on behalf of John and Frances S., no such documents appear in the record.

WCDSS for the removal of the child other than race were merely pretextural.[11] The trial judge also specifically found that the sibling reunification issue argued by WCDSS was "disingenuous" (App. *infra.*, 49). The Mauks noted timely appeals to both the adoption action and the civil rights action, which were consolidated for the purposes of appeal.

3. Disposition on Appeal

On May 6, 1994, the Court of Special Appeals heard oral argument on the Appeal and on September 2, 1994, issued its Opinion. In essence, the Court of Special Appeals affirmed the Circuit Court's ruling on the adoption action, even though no adoption petition on behalf of John and Frances S. was in the record.[12] The Court of Special Appeals held that the Mauks had stated a claim for violation of their equal protection rights and that the Circuit Court erred in dismissing their claims. However,

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[11] The Court of Special Appeals notes: "The Agency's purported inability to explain, through documentation or testimony, how it quantified race in relation to the other factors, its fabrication of the unsubstantiated claim of racial prejudice against Mr. Mauks' father, and the improper manner in which it removed Tiffany from the Mauk home, all lend support to the trial court's conclusion." (App. *infra.*, 30).

[12] To reach this result, the Court of Special Appeals, apparently relied on the Petition and Order which were not part of the record below, and found that the trial court had corrected the "error" after the record was filed in the Appellate Court. In addition, the Court of Special Appeals held that since the Mauks did not raise the "procedural error" at trial, the issue was not properly before the Court of Special Appeals.

the Court of Special Appeals held that the error was harmless because the Mauks were left without any discernable remedy. The Court of Special Appeals reasoned that the claims for declaratory and injunctive relief had been rendered moot by the trial court's "independent" ruling in the adoption proceeding.[13] The Court of Special Appeals also held that neither the Mauks nor Tiffany R. had standing to raise the constitutional violation, because they had no constitutionally protected liberty interest.[14] Finally, the Court of Special Appeals held that the Mauks were not entitled to monetary damages because it found that Engle was "cloaked with immunity against monetary liability under 42 U.S.C. § 1983 because he acted as a State official."(App. *infra.*, 33).

The Court of Special Appeals issued its mandate on October 3, 1994. On October 18, 1994, the Mauks filed a

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[13] Even if assuming, *arguendo*, that the trial court's ruling made the civil rights violation moot, the Court of Special Appeals was incorrect about the procedural facts. The Court of Special Appeals, apparently based on the date the written Order was signed in the civil rights action, erroneously concluded that the trial court had made its ruling on the adoption petition *before* it ruled on the civil rights action. On the contrary, the Circuit Court made its ruling on the adoption petition *after* it dismissed the Mauks' claims and articulated the reasons therefor.

[14] In addition, the Court of Special Appeals held that the Mauks lacked taxpayer standing because they " . . . failed to *prove* how the alleged racially discriminatory use of State and Federal funds by WCDSS would result in an actual increase in the Mauks' taxes". (App. *infra.*, 27)

timely Petition for Writ of Certiorari with the Court of Appeals of Maryland. By Order dated February 16, 1995, the Court of Appeals issued an Order denying the Mauks' Petition for a Writ of Certiorari "as there has been no showing that review by certiorari is desirable and in the public interest."

REASONS FOR GRANTING THE PETITION

I. The Questions Presented Involve Issues Of Vital Importance To The Citizens Of Maryland And The United States.

The cases for which review by this Court is sought, present issues which have and will continue to have a profound effect on families and foster children throughout Maryland and the nation. *See*, Bartholet, *Where do Black Children Belong? The Political Race Matching in Adoption*, 139 U. Pa. L. Rev., 1163, 1185 (1991). The illegal practice of invidious racial discrimination by local agencies responsible for foster care and adoption has resulted not only in litigation in state and federal courts across the country, but has also spawned legislation in the United States Congress.[15] However, because neither the Courts nor the Legislatures have squarely addressed this issue, the illegal practice continues.

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[15] The Multiethnic Placement Act of 1994, 42 U.S.C. § 5115A is similar to legislation which existed in Maryland in 1991. Md. Code Ann. Fam. Law § 5-311(b)(2). The case *sub judice* demonstrates that this type of legislation, which permits an agency to consider race as a "factor" in foster care and adoption decisions, does not eliminate the problem of racial discrimination.

Unfortunately, the racially discriminatory practice of improperly using race in adoptive and foster care decisions is likely to recur with greater frequency, because of the current confusion and misapplication of the law in the Courts, as represented by the decision of the Court of Special Appeals. *See, e.g., Drummond v. Fulton County Dept. of Family and Children's Services*, 563 F.2d 1200 (5th Cir. 1977), *cert. den.*, 437 U.S. 910 (1978); *DeWees v. Stevenson*, 779 F. Supp. 25 (E.D. Pa 1991). While purporting to recognize a "strict scrutiny" standard, the net effect of this line of authority is to establish a rational basis standard for local agencies that use race as a factor in adoption and foster care decisions. Given the present state of the law, an agency is free to camouflage its indiscriminate use of race in these decisions by pointing to some other factor which may coexist with race. This practice, left unchecked, will perpetuate the use of race as a subtle, if not blatant, factor in foster care and adoption decisions and turns modern civil rights jurisprudence on its head. This result, it is submitted, represents a total departure from the decisions of this Court over the past forty years. Therefore, review by this Court is not only desirable, but is in the interest of all citizens of the United States.

These cases involve a challenge to the racially discriminatory practices and policies of the WCDSS, which not only violate deeply and widely accepted views of elementary justice, but also violate fundamental civil rights which are guaranteed by the Constitution of the United States. Petitioners seek review of adverse rulings by the Circuit Court and the Court of Special Appeals on their claims for violation of constitutionally protected rights. Despite recognizing that WCDSS's actions were

"reprehensible" and in violation of equal protection rights, the Court of Special Appeals affirmed the Circuit Court's rulings.

The Mauks assert that the policy and practice of WCDSS in using race as a sole criteria in foster care and adoptive placement decisions is unconstitutional. Because the Mauks have been victims of these discriminatory policies and practices in the past and will continue to be victims of these racially discriminatory practices and policies in the future, they are entitled to declaratory, injunctive and monetary relief.[16] The underlying facts giving rise to the Mauks' claims and subsequent procedural disposition of their claims involve significant issues of public interest which this Court should address.

II. The Court Of Special Appeals' Holding That The Mauks Had Stated A Claim For Violation Of The Equal Protection Clause, But Were Left Without Any Discernable Remedy Conflicts With This Court's Equal Protection Doctrine.

The Court of Special Appeals' holding that the Mauks' civil rights have been violated, but that they have no remedy, amounts to nothing more than a denial of the Mauks' civil rights. This decision, denying the Mauks'

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[16] The Court of Special Appeals erred in upholding the dismissal of the Mauks' claims for monetary damages under § 1983 because that determination involved questions of fact (whether Engle was acting as a local official or a State official) that were not before the Circuit Court. *Ritchie v. Donnelly*, 324 Md. 344, 597 A.2d 432 (1991). The Mauks also assert that they are also entitled to compensation for counsel fees pursuant to 42 U.S.C. § 1988.

request for declaratory and injunctive relief, while paying lip service to their civil rights claims, will have the effect of encouraging such practices in the future. The Mauks, as foster parents in Washington County, Maryland, continue to be subjected to the racially discriminatory policies of the WCDSS to this day. Ironically, while recognizing the injustice, neither the Circuit Court nor the Court of Special Appeals did anything to correct this injustice. Given the social and legal importance of this issue, therefore, it is imperative that this Court squarely address these issues to assure that justice is done in this case and in the future.

A. Equal Protection Analysis

The gravamen of the Mauks' civil rights claims against Engle is that the removal of Tiffany R. from their home and refusal to consent to the Mauks' request to adopt Tiffany R. solely on the basis of race, constitutes invidious racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. After a lengthy discussion as to why the Mauks do not have standing, individually, as next friends of Tiffany R. and as taxpayers of the State of Maryland, to assert a violation of the *Due Process Clause* of the Fourteenth Amendment, the Court of Special Appeals correctly concluded that the Mauks *did* state a claim for violation of the equal protection rights. However, instead of confronting the injustice, the Court of Special Appeals simply avoided the issue. The Mauks aver that they not only stated a claim for these violations;

but, based on the trial judge's findings of fact, they have *established* a violation of the equal protection clause.

The clear and central purpose of the Equal Protection Clause of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the states. *Washington v. Davis*, 426 U.S. 229 (1976); *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964). The Fourteenth Amendment prohibits the State, or any entity acting under the color thereof, from using race or color as a basis of discrimination by direct action or through others who act under the color of State law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Equal protection analysis requires strict scrutiny of classifications when the classification operates, *inter alia*, to the particular disadvantage of a suspect class. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Racial classifications, regardless of purported motive, are presumptively invalid and can only be upheld with extraordinary justification. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Racial classifications are subject to the most exacting scrutiny. *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The Mauks agree with the Court of Special Appeals' holding that the use of race as a sole criterion for adoptive placement is constitutionally invalid.(App. *infra.*, 28-29). However, the Mauks assert that the same analysis should also apply to foster care placement decisions as well. *See, McLaughlin v. Pernsley*, 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989). Moreover, as

the use of race by WCDSS is subject to the most exacting scrutiny, *Palmore v. Sidoti, supra.; Richmond v. J.A. Croson & Co., supra.*, even if race was the predominant factor in the decision to remove the child, it would be constitutionally invalid.

B. The Mauks Have A Remedy In The Form Of Declaratory And Injunctive Relief.

The Mauks' civil rights claim extends beyond the constitutional violation which they established in the adoption action. The Mauks, in the case *sub judice*, requested a declaratory judgment that the removal of the child from their home solely on the basis of race was a violation of the Equal Protection Clause of the Fourteenth Amendment. The Mauks also sought, *inter alia*, to enjoin Engle from such practices in the future. The Mauks further sought a declaration that the constitution prohibited WCDSS from using race negatively, *i.e.*, to the exclusion of other neutral criteria, in its foster care and adoptive placement decisions.

This Court has held that it is improper to dismiss a claim for declaratory relief where, as here, the plaintiffs retain sufficient interest and injury to justify declaratory relief. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974). The Court of Appeals has also held that dismissal of a declaratory judgment is rarely appropriate. *Christ v. Maryland Department of Natural Resources*, 335 Md. 427, 435 644 A.2d 34, 37 (1994) (citation omitted). Where, as here, the Mauks have standing to raise violations of the Equal Protection Clause and continue to suffer injury, the Circuit Court should not have dismissed the action

without declaring the rights of the parties. In like manner, the Court of Special Appeals' affirmation of that dismissal is erroneous and in conflict with well-established doctrines of this Court.

Furthermore, even if the Circuit Court had decided the adoption issue before dismissing the Mauks' claim (which it did not), the Mauks' civil rights claims do not become moot.[17] The Mauks are presently licensed foster care providers in Washington County, however, because they have challenged Engle's discriminatory practices, their home is considered full. This Court has held that a controversy is not mooted where the questioned conduct is likely to recur and the dispute remains unresolved. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968). The Court of Appeals has also recognized that: "[E]ven where a question is technically moot, if the issue is recurring, likely to be raised again, and involves a matter of important public concern, the court may decide the matter." *Kindley v. Governor of Maryland*, 289 Md. 620, 631, 426 A.2d 908, 914-15 (1981). In addition, "A court may decide a moot question where there is an imperative and manifest urgency to establish a rule of future conduct in matters of important public concern. . . . " *Attorney General v. Anne Arundel County School Bus Contractors Association*, 286 Md. 324, 328, 407 A.2d 749, 752 (1979) (citations omitted).

In the present case, the discriminatory practices of WCDSS are not only likely to recur again, but they in fact

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[17] The Mauks aver that the Circuit Court erred in making its decisions in the adoption action "independent" of the constitutional violation.

continue to occur. Where, as here, a governmental agency is improperly using race in violation of the Constitution of the United States, there is an imperative and manifest urgency to establish a rule for future conduct. The Circuit Court had before it sufficient evidence in August, 1992, to find that Engle had violated the Equal Protection Clause of the Constitution. As this is a case of first impression in Maryland and as this Court has not squarely addressed this issue previously, the Circuit Court was left with little guidance to evaluate the use of race in foster care and adoption decisions. This lack of guidance may account for the judicial paralysis which ultimately led to the Mauks' failed adoption petition. Finally, more than two years later, the Court of Special Appeals recognized that the Mauks had stated a claim for violation of the Equal Protection Clause of the Constitution.[18] The Mauks respectfully submit that the Court of Special Appeals' conclusion that a constitutional violation, such as this, can be erased by the passage of time is repugnant to any sense of social justice in this country.

The Court of Special Appeals' Opinion offers no guidance as to how race can be used, if at all, in adoptive and foster care placement decisions. The Court of Special Appeals cited no authority which sets the parameters within which race can be used, if at all, in these circumstances. In fact, newspaper articles which report this Opinion suggest that race can be used as a determining

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[18] Perhaps the gravest injustice in this case is that the trial judge did not rule on the Mauks' civil rights claims until nine months had passed and the child had developed an attachment to John and Frances S.

factor in adoption and foster care placement. As a result, these illegal and unconstitutional practices are likely to continue, not only in Washington County, but also throughout Maryland and the nation. If, for no other reason, this Court should issue a Writ of Certiorari and issue an Opinion which clearly defines how and under what circumstances race can be properly used in decisions such as this to correct this injustice and to prevent further injustices in the future.

C. The Mauks Have Standing To Raise Civil Rights Violation Claims For Themselves And On Behalf Of Tiffany R.

The Court of Special Appeals' holding that the Mauks lacked standing to raise claims for themselves and on behalf of Tiffany R. is likewise in conflict with this Court's precedent. The Mauks assert that the Court of Special Appeals diverged from the teachings of this Court in its holding that the Mauks do not have taxpayer standing to raise the constitutional violations. The Court of Special Appeals' holding that the Mauks " . . . failed to *prove* how the alleged discriminatory use of State and Federal funds by WCDSS would result in actual potential increase in the Mauks' taxes" is illogical. The Mauks never had a chance to prove anything because their Complaint was dismissed. Certainly, the Mauks should be given the opportunity to prove a pecuniary loss. Because the Mauks are attacking the racially discriminatory use by Engle of State and Federal funds, and because the Mauks have been recipients of a portion of the State and Federal funding as foster parents, they have standing to raise their civil rights claims. *See, Flast v. Cohen*, 392 U.S.

83, 102-103 (1968); *Wilder v. Bernstein*, 499 F. Supp. 980, 991 (S.D.N.Y. 1980).

More importantly, the Court of Special Appeals ignored the question of whether the Mauks had standing to raise *equal protection* claims on behalf of Tiffany R. The Mauks aver that they, as foster parents, have standing to bring claims on behalf of Tiffany R. *See, Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 841 (1977); *Chrissy F. v. Mississippi Dept. of Public Welfare*, 883 F.2d 25 (5th Cir. 1989). *McLaughlin v. Pernsley, supra.*, 693 F. Supp at 327. Moreover, because the right of Tiffany R. to equal protection of the laws under the circumstance of this case is intertwined with the equal protection rights of the Mauks, the Mauks are entitled to assert the equal protection claims of Tiffany R. in this case. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *New York Cent. R. R. v. White*, 243 U.S. 188 (1917). Tragically, the Mauks are the only ones who were there to raise the claims.[19]

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[19] Obviously, Engle, who is the "guardian" of the child and the perpetrator of the violation, would not raise the claim for constitutional violation. Likewise, the S. family, who were the recipients of the child by virtue of the constitutional violation, are in no position to raise the claim. Alex Bognar, the court appointed attorney in the adoption action, was not representing the child in the civil rights action. Sadly, the Attorney General of the State of Maryland, who should protect Maryland's citizens against constitutional violations, in fact supported the racially discriminatory policies and referred to the Mauks' claims as "mere constitutional niceties".

III. Both The Mauks And Tiffany R. Have A Constitutionally Protected Liberty Interest Under State Law And Under The Constitution.

The Circuit Court, apparently confusing the Equal Protection and Due Process Clauses of the Fourteenth Amendment, erroneously dismissed the Mauks' civil rights claims based on a finding that there was no constitutionally protected liberty interest. As the Court of Special Appeals recognizes, the Mauks are entitled to claim a violation of the Equal Protection Clause based on WCDSS's establishment and use of racial classifications. *See, Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978). However, while the Mauks did not need to establish a constitutionally protected liberty interest to state a claim under the equal protection analysis, the Mauks nonetheless allege that they and the foster child do have a constitutionally protected liberty interest.

As foster parents, the Mauks aver that they have a constitutionally protected liberty interest, which they may pursue on their behalf, as well as on behalf of Tiffany R. *See, Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 841 (1977); *Chrissy F. v. Mississippi Dept. of Public Welfare*, 883 F.2d 25 (5th Cir. 1989). While this Court suggested that a foster family's liberty interests may be limited by State law, it nevertheless recognized that such an interest may exist. *Smith, supra*, at 447. In the case *sub judice*, the Mauks were entitled to a statutory preference to adopt Tiffany R. because they were her foster parents for more than one year (and by virtue of the strong bond which she developed with the Mauks) before her permanency plan was developed. § 5-525(c)(3)(i) Md. Code Ann. Fam. Law.

Moreover, the Mauks' right to make decisions regarding the racial make up of their family, it is submitted, is protected from intrusion by the State under the United States Constitution. This Court has established that family relationships constitute protected liberty interests protected by the Fourteenth Amendment. *See, Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984). In *Smith*, Justice Brennan posed the question: "But, is the relation of foster parent to foster child sufficiently akin to the concept of 'family' recognized in our precedents to merit similar protection?" *Smith* at 842. That question was left unanswered in *Smith*. The Mauks respectfully submit that the time has come to answer that question and answer it in the affirmative.[20]

In the present case, the Mauks' interests are also rooted in the preference given to the Mauks under State law. *See, Brown v. County of San Joaquin*, 601 F. Supp. 653, 661 (D. E.D. Cal. 1985). This expectation created in the Mauks a liberty interest which should not have been deprived solely on the basis of race. *See, Goldberg v. Kelly*, 397 U.S. 254 (1970); *Hewitt v. Helms*, 459 U.S. 460 (1983). In addition, Tiffany R. clearly has a liberty interest by virtue

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[20] While Justice Brennan, in his opinion, discusses the existence of a liberty interest on behalf of foster children and foster parents, this issue was not squarely addressed by the Court in *Smith*. Unfortunately, in the 18 years since *Smith*, this Court has not squarely addressed these issues and those Circuit Courts that have addressed these issues have done so inconsistently. *Compare, McLaughlin v. Pernsley, supra.*, 693 F. Supp. at 325 *with Drummond v. Fulton County Department of Family and Children's Social Services, supra.*, 563 F.2d at 1207. The Mauks submit that the time has come for this Court to revisit and squarely address these important constitutional issues.

of her "special relationship" with Engle. *L. J. v. Massinga*, 699 F. Supp. 508, 539 (D. Md. 1988). Where, as here, Tiffany R. became an integral part of the Mauk family and the Mauks have a statutory preference in the adoption of Tiffany R., a constitutionally protected liberty interest exists.[21] As a consequence, both the Circuit Court and the Court of Special Appeals erroneously concluded that a liberty interest did not exist. Again, given the importance of this issue, and the lack of any clear authority on this issue, the Petitioners respectfully submit that this Court should issue a Writ of Certiorari and reverse the Court of Special Appeals' holding that neither the Mauks nor Tiffany R. have a constitutionally protected liberty interest.

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[21] The Court of Special Appeals in its opinion states that the Mauks argued that they were entitled to "squatter's rights" based on the aforementioned statutory preference. The Mauks never claimed that they had "squatter's rights", but rather argued that Engle ignored the statutory preferences to advance a racially discriminatory policy. If anything, Engle's illegal removal of the child from the home and the subsequent nine month delay by the Circuit Court in ruling on the Mauks' claims, permitted John and Frances S. to succeed in the Adoption Action on a "squatter's rights" argument.

CONCLUSION

Accordingly, Petitioners respectfully request this Court to issue a Writ of Certiorari to the Court of Special Appeals so that this case can be certified to this Court for review and final determination.

Respectfully submitted,

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REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1638

September Term, 1993

IN RE: ADOPTION/GUARDIANSHIP
NO. 2633 IN THE CIRCUIT COURT
OF WASHINGTON COUNTY

Wenner,
Harrell,
Murphy,
JJ.

Opinion by Harrell, J.

Filed: September 2, 1994

This consolidated adoption and civil rights appeal arose following the denial of a petition for adoption of an African-American toddler, Tiffany R., filed by a Caucasian couple, Michael and Sylvia Mauk, appellants and Tiffany R.'s former foster parents, in the Circuit Court for Washington County (Moylan, J.). The circuit court followed the recommendations of the Washington County Department of Social Services (WCDSS or the Department), appellee and legal guardian of Tiffany R., and

entered an adoption decree in favor of an African-American couple, John and Frances S., also appellees, who, at the time of the proceedings, already had custody of Tiffany R.'s two older brothers.

STATEMENT OF THE CASE

In July 1990, Tiffany R. was removed from the home of her biological mother by the WCDSS and placed with the Mauks. One of her two older siblings, Rodney, was placed with the S. family. Her other brother, Justin R., was placed in another foster home. On 27 September 1990, the WCDSS petitioned the Circuit Court for Washington County to designate all three R. children as Children In Need of Assistance (CINA). The circuit court granted the petition and committed them to the custody of the WCDSS. Each of the R. children remained in separate foster care homes until August 1991 when the WCDSS reunited Justin with Rodney in the S. home.

On 13 December 1991, the WCDSS filed a petition for a Final Decree of Guardianship over the R. children with the right to consent to adoption or long term care short of adoption, which the circuit court granted on 23 June 1992. Accordingly, David A. Engle, the Director of the WCDSS, was appointed guardian of the R. children, including Tiffany.

Following the granting of the decree, the WCDSS removed Tiffany R. from appellants' care and placed her with Mr. and Ms. S., who had care and custody of both Justin and Rodney. The Mauks consequently challenged the WCDSS decision to place Tiffany R. with the S. family

by filing a Motion to Intervene in the guardianship proceeding. The circuit court granted the motion, but declined to return Tiffany to the Mauk home until completion of an evidentiary hearing to determine the best interest of the child.

On 24 July 1992, the Mauks filed a Countercomplaint for Declaratory, Injunctive, and Monetary Relief in the CINA action pursuant to 42 U.S.C. § 1983. The WCDSS responded to the Countercomplaint with a Motion to Dismiss. The Mauks requested the trial court to declare that WCDSS violated their rights under the Equal Protection Clause and to order that the WCDSS permanently return Tiffany to them. Moreover, both the Mauks and Mr. and Ms. S. filed cross-petitions for adoption on 29 September 1992. The WCDSS filed an Answer on 2 October 1992, and requested the circuit court to sever the § 1983 action from the adoption proceedings. On 6 January 1993, the circuit court dismissed the Mauks' countercomplaint from the adoption action and ordered that it be brought in a separate action.

Disposition of the 42 U.S.C. § 1983 Action

Appellants, individually, as next friend of Tiffany R., and as taxpayers of the United States and the State of Maryland, filed a Complaint for Declaratory and Injunctive Relief with the circuit court on 22 January 1993. In response, the WCDSS filed a Motion to Dismiss or, in the alternative, restated its Motion to Stay. On 22 March 1993, the Mauks filed not only a response in opposition to the WCDSS motion, but also filed a Motion for Partial Summary Judgment based on the circuit court's findings of

fact in the adoption proceeding. The circuit court held a hearing on 27 April 1993 to decide the WCDSS's Motion to Dismiss or Stay. At the conclusion of the hearing, the court found that neither appellants nor Tiffany R. had a constitutionally protected liberty interest in preserving the foster family unit. On 26 May 1993, the court issued a written order dismissing appellants' civil rights action. The court declined to rule on appellants' Motion for Partial Summary Judgment because that motion had become moot following the court's dismissal of the action.

Disposition of the Adoption Proceedings

During a preliminary hearing held on 29 January 1993, the circuit court determined that it needed an independent expert to evaluate both the Mauks and the S. family. Judge Moylan appointed Barbara DiCocco, a social worker, to perform the evaluation. The parties and court reconvened on 6 May 1993, at which time Ms. DiCocco presented her recommendations. DiCocco recommended that the child remain with the S. family. On 6 May 1993, Judge Moylan denied the Mauks' adoption petition and entered a decree for adoption in favor of John and Frances S.

On 27 May 1993, appellants filed an appeal of the circuit court's decision to dismiss their civil rights action. On 4 June 1993, their appeal of the circuit court's decision in the adoption proceedings followed. The Mauks' request to consolidate both the civil rights action and the adoption action for the purposes of this appeal was granted on 3 August 1993.

FACTS

Tiffany R. and her two older brothers, all African-American children, were removed from the home of their biological mother in July 1990. At the time of her removal, Tiffany R. was approximately six months old and addicted to crack cocaine from birth as a result of her biological mother's drug abuse. In addition, it was discovered that Tiffany had been a victim of sexual abuse.

On 26 July 1990, each of the R. children was placed with separate foster parents because no relative or foster home could accept all three children. The WCDSS placed Tiffany with the Mauks, a Caucasian couple, who had a reputation for working well with infants born drug-addicted. Appellants had adopted a four-year old African-American female, Janae, and a four-year old biracial male, Dustin, both of whom previously had been foster children in their care.

When she entered the Mauk home, Tiffany's development was far below average for her chronological age. After one year in the care of the Mauks, however, Tiffany had reached the normal development range. Tiffany's pediatrician described the transformation as miraculous and attributed it to the attention that she received from appellants while in their care. Moreover, Tiffany formed a strong sibling relationship with the Mauks' adopted children.

Within two weeks of obtaining custody of Tiffany, Sylvia Mauk began inquiring about adoption. Mrs. Mauk testified that Tiffany's caseworker from the WCDSS informed her that if the plan changed to adoption "it was likely . . . we wouldn't be able to adopt her because she

had siblings." Another caseworker told her that decisions as to whether to keep siblings together were made on a case-by-case basis and that the WCDSS refused to commit at that juncture. By July 1991, however, the WCDSS had determined that the long-term plan for Tiffany should be placement for adoption.

The WCDSS did little to ensure that Tiffany R. maintained contact with Justin and Rodney R. during her stay with the Mauks. Dr. Rebecca Hegar, a qualified foster care expert, testified that an attachment among the R. children, if broken, would lead to a "lifelong sense" of "loss" for the siblings. Purportedly in accordance with this view, on 5 November 1991, the WCDSS made a determination to place Tiffany with the S. family for the purposes of adoption. Interestingly, Mr. and Ms. S. admitted that, prior to the WCDSS plan, they had not devoted any attention to a potential adoption of Tiffany.

It is undisputed that the WCDSS made its institutional determination without consulting Tiffany's caseworker, her pediatrician, or its own resident psychologist. Both the caseworker and the pediatrician testified at the adoption proceeding that, had they been informed of the Department's intentions, they would have advised against it based on Tiffany's best interest. The WCDSS psychologist testified, in effect, that Tiffany's removal would be warranted only where there was "an extremely good reason."

At the time that it decided to pursue an adoption plan with Mr. and Ms. S., the WCDSS decided that appellants would not be suitable adoptive parents for Tiffany. On or about 16 March 1992, the WCDSS informed the

Mauks that it intended to place Tiffany R. in an African-American foster home. Initially, it cited, as an obvious reason for its decision, a desire to reunite Tiffany R. with her brothers. In addition, the WCDSS admitted that the race of the potential adoptive parents was considered, but it was unable to explain what weight that factor was given in the overall evaluation. It noted its concern that there would be no integration of the children into the African-American community because the Mauks lived in a predominantly Caucasian neighborhood.

After appellants informed the WCDSS that they intended to challenge Tiffany's eventual removal from their home, the WCDSS cited additional, more accusatory, reasons for its decision. The Department, based on statements allegedly made by Mrs. Mauk, asserted that Mr. Mauk was not involved sufficiently in the parenting process because he worked long hours and weekends. In addition, it claimed that Mr. Mauk's father had exhibited racial prejudice against their adopted African-American daughter for a period following her adoption. The WCDSS never contacted anyone to confirm or deny these allegations. At trial, the Department was unable to produce any evidence to substantiate its claim in this regard. Indeed, Mr. Mauk's father vehemently denied the allegation and testified under oath that he loved Tiffany as if she were his natural grandchild.

As a final basis for its decision, the WCDSS asserted that keeping the situation status quo would overburden the Mauks with "special needs" children and, therefore, it would not be in any of the children's best interests for Tiffany to remain in the Mauk household. It was undisputed, however, that for the purpose of State subsidies,

neither Tiffany R. nor Janae Mauk was considered a "special needs" child.

On 29 March 1992, with the adoption battle well underway, Tiffany R. fell into a swimming pool. She was recovered unconscious, given CPR, and immediately taken to the hospital as a precautionary measure. The physicians who treated Tiffany advised WCDSS that it would not be in the child's best interest, following the trauma, to remove her from the Mauk household. Despite the hospital's advice in this regard, the WCDSS removed Tiffany R. from appellants' home on 31 March 1992 and placed her with the S. family. The record indicates that Child Protective Services confirmed the accidental status of the incident to WCDSS on 1 April 1992, but the Mauks were not informed of the finding until 15 April 1992.

Despite the findings of Child Protective Services, Tiffany R. was not returned to appellants' home. After a period of approximately two and one-half weeks, the WCDSS, following a recommendation from its psychologist, consented to bi-weekly visitation between Tiffany R. and appellants. In May 1993, however, the Department inexplicably terminated the Mauks' visitation privileges. As a result, appellants filed a countercomplaint in the adoption/guardianship proceedings, seeking, *inter alia*, *pendente lite* care of Tiffany, pending a final decision by the court on the child's adoption.

On 20 August 1992, the circuit court held a hearing to determine the *pendente lite* custody issue. The 20 August proceedings began what became a long and arduous task for the court of accumulating and evaluating the opposing sociological and psychological expert testimony

offered by the parties. The WCDSS and its expert witnesses recommended not only a *pendente lite,* but also a permanent, placement for Tiffany R. in the S. home. The only expert testimony offered in support of appellants' position at the 20 August hearing came from Tiffany's pediatrician.

On 28 August 1992, the circuit court denied appellants' Request for Interlocutory Injunction and granted *pendente lite* custody of Tiffany R. to Mr. and Ms. S. with two-hour visitation periods between Tiffany and appellants twice a week. The visits, which were supervised by a licensed social worker, began on 16 September 1992[1] and continued until May 1993.

The circuit court held a hearing to resolve the parties' cross-petitions for adoption and consider testimony concerning the global issue of trans-racial adoption on 30 October 1992. Both parties presented expert testimony analyzing the importance of race in determining which placement would be proper for Tiffany R.

Unable to make a decision based on the expert testimony and fact witnesses presented by the parties, the court took the matter under advisement. After making its preliminary findings of fact on 20 December 1992, the circuit court, on 6 January 1993, ordered that a neutral expert evaluate the S. family and the Mauks. The court appointed Barbara DiCocco, a licensed social worker, as

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[1] The social worker who supervised the first visitation period testified that, despite an absence of approximately four months, Tiffany R. immediately recognized the Mauks and referred to them as "Mommy and Daddy."

the court's expert witness. On 6 May 1993, Ms. DiCocco recommended permanent placement in the S. home. Although she acknowledged that appellants were also a suitable adoptive family for Tiffany, Ms. DiCocco concluded that "Tiffany will suffer loss again if she is sent back to the Mauks. This will be debilitating to her development and well-being." Her ultimate conclusion was not based on the disingenuous accusations against the Mauks set forth by the WCDSS. Rather, her opinion rested on the potential for further harm to the child if she was removed yet again from an environment that the evidence suggests she considered to be her home.

Despite its protracted condemnation of the WCDSS for its atrocious handling of the case,[2] the trial court adopted the position of Ms. DiCocco and signed an Order authorizing Tiffany R.'s adoption by Mr. and Ms. S. Judge Moylan concluded, *inter alia,* that:

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[2] In particular, based on his extensive consideration of the evidence, Judge Moylan noted the following "grave injustices" committed by the WCDSS: 1) taking full advantage of the Mauks' skill in bringing Tiffany up to par developmentally while looking for an alternative same race family; 2) looking for a suitable African-American family without informing the Mauks; 3) using the pool accident as an excuse to remove the child from the Mauk household at a time when Tiffany needed stability; 4) overemphasizing sibling bonding as a major reason for placement with the S. family when its overall scheme was to seek out a same race placement for Tiffany; 5) wielding unsubstantiated claims of "marital discord" and racial prejudice against the Mauks; and 6) using race as the sole factor by which to make an initial judgment regarding permanent adoption placement.

> The child is attached and is an integral part of that family [the S. family] and I think in her best interest I'm not prepared to take the risk and move her back to the Mauk home. . . . [t]o again remove her today from the S. home would be a third time for her and I'm not prepared to do that. I think it would be wrong. I think it was wrong when the Department of Social Services did it and I think it would be wrong if I were to do it now.

ISSUES

On appeal, the Mauks contest the trial court's conclusions in both the adoption proceedings and the constitutional claims brought by appellants under 42 U.S.C. § 1983. We have rephrased and reorganized their arguments as follows:

I. The trial court abused its discretion by granting the S.'s Petition for Adoption.

   A. The Mauks had the only valid petition for adoption before the court.

   B. The WCDSS violated various statutory provisions of the Family Law Article in deciding to place Tiffany R. with the S. family.

   C. The trial court abused its discretion by finding that it was in Tiffany R.'s best interest to be adopted by Mr. and Ms. S. rather than the Mauks.

II. The trial court erred in dismissing the Mauks' complaint under 42 U.S.C. § 1983 because the Mauks had standing to bring the claims.

   A. The Mauks have standing to state a claim under 42 U.S.C. § 1983.

B. The Mauks were denied equal protection under the Fourteenth Amendment of the Constitution.

III. The trial court erred by granting the Motion to Dismiss appellants' 42 U.S.C. § 1983 claims.

Based on our thorough review of the record and the applicable law, we conclude that Tiffany R. should remain in her current adoptive placement with the S. family. Although we find the actions taken by the WCDSS with regard to the Mauks to be reprehensible, we are forced by constitutional restraints to affirm the trial court's dismissal of the Section 1983 action as well.

I.

Standard of Review

The scope of appellate review of a trial court's decision in adoption proceedings is generally limited to whether the trial court abused its discretion or whether the findings of fact by the trial court were clearly erroneous. *Coffey v. Dept. of Social Services of Baltimore City*, 41 Md.App. 340, 346 (1979). If it appears that the chancellor erred as to matters of law, further proceedings ordinarily will be required unless the error is determined to be harmless. *Id.*

Appellants do not dispute the findings of fact made by Judge Moylan. Rather, they contend that the trial court abused its discretion in denying their adoption petition in favor of Mr. and Ms. S. because: 1) the Mauks' Petition for Adoption was the only petition before the court; 2) the Mauks were entitled to a statutory preference due to their

long-term foster parent status; and 3) it is in Tiffany R.'s best interest to be adopted by the Mauks. We disagree.

A. The Validity of the S.'s Petition for Adoption

Appellants contest the validity of the trial court's adoption order because they argue that theirs was the only Petition for Adoption before the court. It appears from the record that, as a result of a clerical error, the Petition for Adoption submitted by Mr. and Ms. S. was not consolidated properly for trial with the Petition for Adoption filed by the Mauks. Appellants in no way allege that the court's consideration of the S. Petition resulted in an inability to argue the merits of their own petition. Indeed, the record indicates that all parties were given full opportunity to present their respective positions at the adoption and guardianship proceedings. Even though the error was corrected later by the trial court,[3] the

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[3] The record makes apparent that, when the trial court entered its Order granting the S.'s Petition for Adoption of Tiffany R. on 6 May 1993, neither the court nor the parties were aware that the S. Petition had been filed under a different number than the Mauk Petition. No action was taken by the S.'s under the separate case number assigned to them. Consequently, the clerk of the circuit court notified them of the court's intention to dismiss their case. Because their Petition was being considered in full under a separate case number, the S.'s believed that there was no need for them to take any action on the separate case.

Apparently, following appellants' appeal to this Court, the discrepancy was brought to the attention of the trial court. In order to correct the technical mistake, the trial court issued an Order on 8 March 1994 which stated:

Mauks request us to hold that the trial court abused its discretion, at the time of its ruling, by failing to recognize noncompliance by Mr. and Ms. S. with procedural rules allegedly governing adoption proceedings.

The record is devoid of any indication that appellants raised this issue during the adoption/guardianship proceedings. Judge Moylan, on several occasions, made perfectly clear that the court was evaluating both the Mauks' and the S.'s petitions. Appellants never objected to the trial court's references to, or reading and consideration of, the S. Petition. Moreover, when Judge Moylan ruled in favor of granting the S. Petition, the Mauks failed to object on the procedural grounds that they now present to us. An issue is properly before an appellate court only if was properly presented to the trial court and decided by it in the first instance. *Battista v. Savings Bank of Baltimore*, 67 Md.App. 257, 261 n.2 (1986). Accordingly, we hold that this issue was not preserved for appeal.

B. Alleged Statutory Violations by the WCDSS

Next, appellants claim that the trial court abused its discretion by failing to recognize that the WCDSS

Upon review of these proceedings by the court, *sua sponte*, it was discovered that this case was actually prosecuted in Case No. A [-] 2633, but through inadvertence, a motion for consolidation for trial was not filed and ordered. Therefore, the Notification to Parties of Contemplated Dismissal in these proceedings is moot.

It is ORDERED this 8th day of March, 1994, that the Notification to Parties of Contemplated Dismissal is hereby withdrawn.

violated Maryland law by refusing to give them the preference for adoption based on their status as long-term foster parents. Moreover, the Mauks assert that the WCDSS wrongfully withheld its consent to their Petition for Adoption based solely on the factor of race. The trial court's insufficient regard for the statutory violations by the WCDSS, according to the Mauks, warrants our reversal of its conclusion in favor of Mr. and Ms. S.

The Family Law Article provides, in pertinent part, that:

> In developing a permanency plan that is in the best interests of a child under foster care, the local department shall consider the following, in the descending order of priority: . . . (3) adoption in the following descending order of priority: (i) by a current foster parent with whom the child has resided continually for at least the 12 months prior to developing the permanency plan or for a sufficient length of time to have established positive relationship and family ties; or (ii) by another approved adoptive family.

Md. Code (1974, 1991 Repl. Vol.), § 5-525(c)(3) of the Family Law Article. The WCDSS claims that it factored the statutory preference into its consideration of which adoptive family to recommend, but rejected appellants in favor of the S.'s who had custody of Tiffany R.'s brothers and were of the same race as Tiffany.

Appellants seemingly assert that they were entitled to a "right of first refusal" to Tiffany based on the aforementioned portion of Section 5-525. This view is not in accordance with the plain meaning of the statute. The

relevant provision clearly states that the agency must "consider" placement with a current long-term foster parent. It in no way mandates, however, that the agency *must* recommend placement with that parent.

Likewise, the Mauks contest the use of race, which they claim to be the "overriding" factor considered by the WCDSS in favor of the S. family. In support of their position that the extent of the WCDSS's reliance on race was illegal, appellants cite Section 5-311(b)(2), which states, in pertinent part, that:

> [t]he executive head of the child placement agency may not withhold consent for the sole reason that the race or religion of the prospective adoptive parents is different from that of the individual to be adopted or of the birth parents, where to do so would be contrary to the best interests of the child.

The language of the statute demonstrates that it was enacted to resolve situations in which potential adoptive parents request consent from a child placement agency and are rejected based solely on their race or religion. In the case *sub judice,* however, appellants never requested the agency's consent to adopt Tiffany R. Instead, they waited until the agency made a choice on its own and then intervened. Thus, the WCDSS did not reject the Mauks because they were Caucasian; rather, it selected the S. family because it was a highly suitable African-American family that already had custody of Tiffany R.'s siblings. Accordingly, we hold that neither Section 5-525 nor Section 5-311 lends any support for appellants' position.

C. Trial Court's Conclusion Regarding "Best Interest"

When deciding a contested adoption case, a trial court must employ the "best interest" standard. *In re: Adoption/Guardianship No. 10941,* ___ Md. ___ (No. 134) (September Term, 1993) (filed 13 June 1994) (slip op. at 14). The determination as to what would most appropriately serve the welfare and best interests of the child is made at the time of the final decision rather than at the time of the first hearing, *Crump v. Montgomery,* 220 Md. 515, 525 (1959), *following remand,* 224 Md. 470 (1960). The trial court may evaluate any number of factors when making a decision in an adoption proceeding. M.L.E., Adoption § 48 at 230 (1960). Each case is unique and this one is no exception.

The Mauks contend that the trial court abused its discretion in finding that the S. home was the proper adoptive placement for Tiffany R. They assert that Judge Moylan "blindly followed" the recommendations of the court-appointed expert and "ignored other relevant evidence." Indeed, a virtual myriad of expert testimony from medical, psychology, social work, and sociology professionals was presented by the parties for the trial court's ingestion. The majority of experts who observed both families and Tiffany's interaction with them testified that, since her removal from the Mauks' home, Tiffany had developed strong bonding and emotional attachments to the S. family.[4] The experts presented by

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[4] At the 20 August 1992 hearing, the WCDSS psychologist, Dr. Gregory Powell, testified that, based on the previous bonding that occurred between Tiffany and the Mauk family, a

appellees also emphasized that the importance of keeping Tiffany with her biological siblings would increase over time. With the exception of Tiffany's pediatrician, all of the experts opined that transplanting Tiffany from the S. home back to the Mauks would only disrupt the child again.

Both parties produced experts to address the issue of race. The Mauks presented the testimony of a sociologist, Dr. Rita Simon, who had conducted a twenty-year study of 204 transracial adoptive families. Although she did not observe Tiffany with the Mauks or the S. family, Dr. Simon opined that children in transracial adoptive families, such as the Mauk family, generally have an enhanced sense of racial identity. In contrast, appellees' expert, Dr. Rebecca Hegar, specifically evaluated Tiffany's placement and then concluded that the ideal adoptive parents would provide the child with the ability to "meet their long-term needs for association . . . with their kinship network, [and] with their own ethnic or racial group." Based on this, and additional factors cited above, Dr. Hegar opined that the S. family was the proper placement.

The trial court also considered the opinions of individuals appointed by the court to make impartial determinations. Alex Bognar, an attorney appointed by the trial court to represent Tiffany R., explained that "it would not be in her [Tiffany R.'s] best interest to look to

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parental reattachment with them could be easily re-established. Yet, at that hearing and the one held on 30 October 1992, Dr. Powell opined that Tiffany had developed strong bonding and emotional ties to the S.'s who provided her with "high quality parenting."

the past at what happened, but to look to the present. . . . I don't think another separation would benefit her . . . and it wouldn't be in her best interest to remove her."

Moreover, the trial court acknowledged that it relied on the recommendations of Ms. DiCocco, the court-appointed expert and social worker, who observed both families and Tiffany's interaction with them. DiCocco found that both the Mauks and the S. family were suitable adoptive families and that Tiffany's strongest relationship was with the Mauks' adopted daughter, Janae. Yet, DiCocco concluded that Tiffany should remain with the S. family because Tiffany would "suffer loss again if sent back to the Mauks." DiCocco further opined that moving Tiffany again would be "debilitating to her development and well being[,] . . . harmful and not in . . . [her] best interest."

The trial court's summation of its findings indicates that it considered thoroughly all issues raised by the parties. Although it acknowledged that the "same-racial makeup" was a factor in its decision, the court concluded that it was not the "overriding" factor. Rather, as stated *supra*, the court cited, as the determinative factor, the expert testimony suggesting removal from another family to which Tiffany had become attached would have a negative impact on the child's development.

We concur with Judge Moylan's conclusion that the WCDSS committed a "grave injustice" against the Mauks when it removed Tiffany from their home. The best interest of the Mauks, however, was not the proper focus of the trial court's inquiry. We hold that the trial court made a well-informed and rational decision when it concluded

that Tiffany's interests would best be served by adoptive placement with the S. family. Accordingly, we affirm.

II.

The Mauks also appeal the decision of the trial court to dismiss their claims under 42 U.S.C. § 1983[5] in which they alleged that actions taken by the WCDSS in the handling of the Tiffany R. adoption proceedings violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This is a case of first impression in Maryland. Throughout our analysis, therefore, we shall look for direction from other courts that have decided the issues presently before us. A review of the relevant precedent reluctantly leads us to conclude that the trial court's decision should not be disturbed.

Standard of Review

Pursuant to Maryland Rule 2-322(b), in reviewing a disposition by granting a motion to dismiss, "we must assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings." *Sharrow v. State Farm Mut.*

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[5] Section 1983 provides, in pertinent part, that:
Every person who, under color of any statute, . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

Auto. Ins. Co., 306 Md. 754, 768 (1986); *Baker, Watts, & Co. v. Miles & Stockbridge*, 95 Md.App. 145, 186 (1993). Moreover, we consider the "well pleaded allegations" in the light most favorable to the Mauks. *Berman v. Karvounis*, 308 Md. 259, 264 (1987).

A. Violation of the Mauks' Right to Due Process

The trial court dismissed appellants' Section 1983 action because it determined that they did not have a protected liberty interest under the Due Process Clause of the Fourteenth Amendment. Relying on federal precedent, Judge Moylan concluded that "there is no liberty interest in the continuation of foster care or [in] the right of foster parents to adopt." In addition, the trial court found that the Mauks had no standing to seek relief either on behalf of Tiffany R. or as taxpayers.

In order to sustain their due process claim, the Mauks must show that they were deprived of a federally secured right by persons acting under color of state law. *Wassif v. North Arundel Hosp. Assn. Inc.*, 85 Md.App. 71, 78 (1990). Appellants do not contend that the applicable statute, Section 5-525(c) stated *supra*, is unconstitutional; rather, they assert that the application of that law by the WCDSS was violative of their protected liberty interest as foster parents, next friend of Tiffany R., and taxpayers of Maryland.

1. Standing As Foster Parents

Appellants claim that they have standing to assert a due process violation because 1) they were entitled to a

statutory preference in the adoption of Tiffany R.; and 2) they became Tiffany R.'s "psychological" family during their period of foster care with her. We have concluded already, *supra*, that the language of Section 5-525(c)(3) in no way guaranteed Tiffany R.'s placement with the Mauks. Our analysis of appellants' standing in this regard is limited to their claimed role as Tiffany's "psychological" family.

Foster care is a statutory creation that enables the state to maintain ultimate responsibility for children without having to care for them on a daily basis. *See* Section 5-525(b) of the Family Law Article. The foster care system clearly was designed as a transitional program from which children under the care of the state eventually would be returned to their biological parents, placed with relatives, or adopted by an appropriate family. *See id* at Section 5-525(c).

The ephemeral nature of the foster care relationship was discussed at length by the Supreme Court in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1971) [hereinafter *OFFER*]. Although the *OFFER* Court did not find it necessary to resolve whether foster parents enjoyed a protected liberty interest in parental rights, both Justices Brennan and Stewart discussed the foster parents' due process claim in detail. Speaking for the Court, Justice Brennan noted that while "the usual understanding of 'family' implies biological relationships, . . . the importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association." *OFFER*, 431 U.S. at 843-44. He highlighted, however, the contrast between the defined liberty

interests of biological parents that stem from blood relationships and the foster parental contract that has its "origins in an arrangement in which the state has been a partner from the onset." *Id.* at 845. In this context, Justice Brennan emphasized that "where . . . the claimed interest derives from a knowingly assumed contractual relationship with the state, it is appropriate to ascertain from state law the expectations and entitlements of the parties." *Id.* at 846. In his concurring opinion, Justice Stewart expanded upon Justice Brennan's commentary by remarking that "any case where the foster parents had assumed the emotional role of the child's natural parents would represent not a triumph of the system, to be constitutionally safeguarded from state intrusion, but a failure." *Id.* at 861.

The dicta contained in the *OFFER* decision has lead a number of courts to conclude that foster parents do not enjoy a constitutionally protected liberty interest as a child's psychological family. *See e.g., Kyees v. County Dep't of Public Welfare,* 600 F.2d 693, 694 (7th Cir.1979) ("Because they can be ended by the state, foster families must, then, be seen as enjoying considerably more limited 'liberty' than natural families or those related by adoption."); *Drummond v. Fulton County Dept. of Family and Children's Services,* 563 F.2d 1200, 1207 (5th Cir.1977), *cert. denied,* 437 U.S. 910 (1978) ("[I]n the eyes of the state, which creates the foster relationship, the relationship is considered temporary at the outset and gives rise to no state created rights in the foster parents"); *DeWees v. Stevenson,* 779 F.Supp. 25, 28 (E.D.Pa. 1991) ("Foster parents do not have a cognizable liberty interest in maintaining a relationship with a foster child vis-a-vis prospective adoptive parents,

particularly where the relationship is based on a contract under which the state retains responsibility for the child and places him in a foster home on a temporary basis."); *Sherard v. Owens*, 484 F.Supp. 728, 742 (W.D.Mich. 1980), *aff'd*, 644 F.2d 542 (6th Cir.), *cert. denied*, 454 U.S. 828 (1981) ("[A]ny expectation of 'family' continuity or permanency based upon the provisional foster family license . . . was totally unreasonable."). These authorities are consistent and persuasive in their analysis that foster parents lack standing to assert violations of a constitutionally protected liberty interest.

Because the foster parent relationship is a creature of statute and because it has not been recognized as legally equivalent to either the biological family or adoptive family, we are obliged to conclude that the preservation of the foster care family unit for adoptive purposes is not a liberty interest protected by the Constitution. Indeed, any interest arising from the foster care relationship is limited to that derived from the laws that create it. *See Drummond*, 563 F.2d at 1207.

2. Standing As Next Friend of Tiffany R.

Appellants also claim that, as foster parents, they are entitled third-party standing to assert purported constitutional violations against Tiffany R. They rely primarily on *McLaughlin v. Pernsley*, 654 F.Supp. 1567 (E.D.Pa. 1987), to support their position. In *McLaughlin*, an African-American infant was placed in an emergency foster home with Caucasian foster parents. *McLaughlin*, 654 F.Supp. at 1570. Approximately two years later, the social services agency that placed the child with the Caucasian couple removed

him and placed him with African-American foster parents. *Id.* at 1571. The Caucasian foster parents sued the social services agency, claiming that the sole reason the child was removed from their care was their race. *Id.* Relying on the *Smith* decision, the federal district court held, and the Third Circuit affirmed, that "foster parents have standing to raise the rights of foster children in a federal forum." *Id.* at 1583. Later, however, when the Caucasian couple sought a preliminary injunction for the return of the child to their foster care, the federal district court recognized the limitations of the couple's Due Process Clause protection. *See McLaughlin v. Pernsley,* 693 F.Supp. 318, 325 (E.D.Pa. 1988), *aff'd,* 876 F.2d 308 (3rd Cir. 1989) ("The plaintiffs do not argue that the liberty interest they claim . . . sources from the Due Process Clause itself. In light of the Supreme Court's decision in . . . [*OFFER,*] such an argument by the plaintiffs might have little force.") [hereinafter *McLaughlin II*]. Thus, neither *McLaughlin* nor *McLaughlin II* clearly stands for the specific proposition that appellants are seeking to advance under the Due Process Clause.

In addition, the facts of *McLaughlin* are distinguishable from the case *sub judice.* In *McLaughlin,* the Caucasian foster parents sought to regain custody of the child for extended foster care, not for adoptive purposes. *McLaughlin,* 654 F.Supp. at 1582. Thus, there were no adoption proceedings prior to the court's consideration of the Section 1983 action from which the court could conclude definitively who was responsible for the guardianship of the child. *See id, quoting OFFER,* 431 U.S. at 841 n.44 ("[T]heir [the children's] interest is ordinarily represented in litigation by parents or guardians. In the instant

case, however, the State, the natural parents, and the foster parents, all of whom share some portion of the responsibility for guardianship of the child, . . : are parties."). In contrast, by the time appellants' Section 1983 action was presented, the trial court already had signed the Adoption Decree in favor of Mr. and Ms. S. This decree of adoption made Mr. and Ms. S., as well as her court-designated independent counsel, the definitive guardians of Tiffany R.'s interests.[6] *See* Maryland Rule 2-202(b) ("An individual under disability to sue may sue by a guardian or other like fiduciary or, if none, by next friend.").

Even assuming, *arguendo*, that appellants had standing to argue on behalf of Tiffany R., existing authority indicates that a foster child has no recognized liberty interest in remaining with a specific foster care family. *See Drummond*, 563 F.2d at 1207-09 (ruling that an infant of tender years enjoys no constitutional interest in a "stable environment" where the state's motive in interrupting the child's environment at any point was always to move him to a place which it considered "superior . . . for his particular needs"). The trial court properly dismissed the Mauks' claims raised on behalf of Tiffany R.

3. Standing Based on Taxpayer Status

Appellants claim that, as recipients of state and federal funds for their role as foster parents, they have

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[6] In addition, we note that the Mauks' own interests in the outcome of the Section 1983 litigation, in fact, may conflict with Tiffany R.'s best interests.

taxpayer standing to challenge the WCDSS actions against them. Under Maryland law, " 'taxpayers have standing to bring suit to challenge the constitutionality of a statute when the statute[,] as applied[,] increases their taxes.' " *State v. Burning Tree Club, Inc.*, 315 Md. 254, 291 (1989), *quoting, Maury v. Comptroller*, 241 Md. 383, 391, *cert. denied*, 385 U.S. 816 (1966). In the instant case, the Mauks have failed to prove how the alleged racially discriminatory use of state and federal funds by the WCDSS would result in an actual or potential increase in the Mauks' taxes. Whether Tiffany R. was placed with the S. family or the Mauks, the tax liability would be the same. Accordingly, appellants' contention is illogical and without merit.

B. Violation of the Mauks' Equal Protection Rights

The Mauks assert that the WCDSS refusal to place Tiffany R. with the Mauks for permanent adoption violated their and Tiffany R.'s equal protection rights. Appellants do not dispute the validity of Section 5-525(c) of the Family Law Article, stated *supra*, that, in effect, grants local social service agencies the ability to consider race when making adoptive placement recommendations. Rather, they challenge the WCDSS's alleged misapplication of the statute. The Mauks argue that the trial court erred by failing to conduct a strict scrutiny analysis to determine that the WCDSS impermissibly used race as the sole determinative factor in favor of Tiffany's placement with the S. family.

The WCDSS admits that it considered the race of the prospective adoptive parents, but argues that it considered the reunification of Tiffany R. with her biological siblings to be the paramount factor in reaching its ultimate recommendation. During his consideration of the agency's Motion to Dismiss the Section 1983 action, Judge Moylan did not make findings of fact regarding the grounds specified by the WCDSS that lead to its recommendation in favor of Mr. and Ms S. That discussion was limited to his findings of fact during the adoption proceedings.

Judge Moylan initially found that, although race was the "overriding decisive factor" considered by the agency, the WCDSS also treated the reuniting of the siblings issue as a "genuine consideration." Later, however, during his final findings of fact related to the adoption proceedings, Judge Moylan retracted his earlier finding and stated that the only reason cited by the WCDSS for its decision

> that gave me some trouble was the reuniting of Tiffany with her siblings. And . . . the reason why I think even that reason was disingenuous was the fact that during the twenty months while Tiffany was with the Mauks, the visitation between her and her two brothers was pretty sporadic or spotty and it certainly was not given any great attention or importance at the time, and then all of a sudden it become a principle [sic] reason for the basis for the adoption.

While race may be considered legitimately as one of the factors in making the ultimate placement decision, *see e.g., J.H.H. v. O'Hara*, 878 F.2d 240, 244 (8th Cir. 1989)

("race may be considered as a relevant factor in determining the best interest of the child"); *Drummond*, 563 F.2d at 1205 ("consideration of race in the child placement process suggests no racial slur or stigma in connection with any race. It is a natural thing for children to be raised by parents of their same ethnic background"); *Petition of R.M.G.*, 454 A.2d 776, 788 (D.C.App. 1982) ("the use of race, as one factor, may be necessary to serve the best interest of the child"), courts that have addressed the issue agree that race may not be used in an automatic fashion to prescribe the appropriate adoptive placement. *See e.g., Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) ("The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."); *McLaughlin II*, 693 F.Supp. at 324 ("[I]t is evident from these plain observations that use of race as the *sole criterion* in making proper long-term foster care placements of black foster children is inadequate[.]") (emphasis in original); *see also Compos v. McKeithen*, 341 F.Supp. 264, 266 (E.D.La. 1972) (invalidating a statutory prohibition on interracial adoption by concluding that "the necessity for racial matching of parent, or parents, and child in adoption to promote the best interests of the child, and the reasonableness of that racial classification in light of that purpose cannot be sustained"); *In re Moorehead*, 600 N.E.2d 778, 786 (Ohio App. 2 Dist. 1991) ("The difficulties inherent in interracial adoption justify consideration of race as a relevant factor in adoption, but do not justify race as being the determinative factor.").

In the instant case, the trial court, in the adoption proceedings, found that the WCDSS had used race as the sole criterion by which to judge the appropriate placement for Tiffany R. The agency's purported inability to explain, through documentation or testimony, how it quantified race in relation to the other factors, its fabrication of the unsubstantiated claim of racial prejudice against Mr. Mauk's father, and the improper manner in which it removed Tiffany from the Mauk home all lent support to the trial court's conclusion. The trial court never specifically decided the equal protection claim raised by appellant. Rather, it merely focused on the liberty interest analysis required under the due process inquiry. Consequently, it neglected to address the issue initially raised during the adoption proceedings. Thus, the trial court presiding over the Section 1983 action erred by failing, after considering the facts in a light most favorable to appellants, to conclude that the WCDSS had violated the Mauks' equal protection rights.

Though the trial court erred by finding that the Mauks' constitutional claims were without merit, we hold that the error was harmless because, at the time it considered the motion, the Mauks were left without any discernible remedy. The injunctive and declaratory relief sought by appellants had become effectively moot by the trial court's independent ruling in the adoption proceedings.

III.

We shall consider briefly the Mauks' claim for monetary relief under Section 1983. Appellants attempted to sue under Section 1983 both the WCDSS and David A.

Engle in his official capacity as Director of the WCDSS. The trial court dismissed the claims. The Mauks now argue that the trial court "was required to look beyond Engle's classification under State law and focus on the particular [local] function which was being performed at the time." We disagree.

"With regard to an action for money damages, neither a state nor a state agency nor a state official *sued in his official capacity* is a 'person' within the meaning of § 1983." *Ritchie v. Donnelly*, 324 Md. 344, 355 (1991). In *Ritchie v. Donnelly*, the Court of Appeals noted that a trial court must look at the particular function that a state official is performing to determine the official status for Section 1983 purposes. *Id.* at 357. If a particular state official serves in both a state and local capacity, the official may be classified as a "person" under Section 1983 if acting in his or her *local* official capacity. *Id.* (citing *Dotson v. Chester*, 937 F.2d 920, 927 (4th Cir.1991), in which the Fourth Circuit held that, for § 1983 purposes, a sheriff may be considered a state official when arresting a suspected lawbreaker but a local official in operating a county jail).

In contrast to the situation presented in *Dotson*, the Mauks have not asserted which particular duties performed by Engle would classify him as a local official. Rather, they assert that further fact-finding possibly could have revealed that "the particular function which was being performed at the time" Engle decided to recommend Tiffany R. for placement with the S. family was a local one. A close examination of the analysis employed by the Fourth Circuit in *Dotson*, however, indicates that

Engle was acting as a state, rather than county, official when he made the recommendation.

In *Dotson*, the Fourth Circuit focused on the standard set forth by the Supreme Court in *City of St. Louis v. Praprotnik*, 485 U.S. 112, (1988), that "only those municipal officials who have 'final policymaking authority' may by their actions subject the [local] government to § 1983 liability." *Dotson*, 937 F.2d at 924, *quoting Praprotnik*, 485 U.S. at 123. In *Praprotnik*, the Court held that "the identification of policymaking officials is a question of state law," *Praprotnik*, 485 U.S. at 124, because "state law will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." *Id.* at 125.

An examination of the relevant state law in the case *sub judice* leads us to conclude that Engle did not enjoy "final policymaking authority" over the WCDSS. The statutory provision authorizing the creation of the local social services departments and enumerating the responsibilities of the local directors, Md. Code (1957, 1991 Repl. Vol.), Art. 88A § 13(c), states, in pertinent part, that "[t]he local director in each county, . . . shall administer within his respective county social service and public assistance activities, . . . in accordance with § 3 of this article. Each local director has a general administrative responsibility to the State Administration." In turn, Section 3 of Article 88A defines the powers and duties of the SSA. *See* Art. 88A, § 3(a)(1) ("All of the activities of the local departments in the counties and in Baltimore City, which the State Administration finances, in whole or in part, shall be subject to the supervision, direction and control of the State Administration."). Thus, state law makes clear that

a local social services director merely functions as the arm of the SSA in each of Maryland's counties and Baltimore City. *Cf. Manders, et al. v. Brown, et al.*, ___ Md.App. ___ (No. 1893) (September Term, 1993) (filed 5 July 1994) (slip op. at 18-28) (discussing potential boundaries of immunity for state legislative officials whose duties are not set forth specifically by statute).

The relevant statutory provisions delineate that Engle did not have "final policymaking authority" over the recommendations process employed by the WCDSS. The ultimate authority rested with the SSA. Although the action taken by Engle against the Mauks was in no way commendable, we hold that he is cloaked with immunity against monetary liability under 42 U.S.C. § 1983 because he acted as a state official. Therefore, we must affirm the circuit court's decision to dismiss appellants' civil rights action.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY THE WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES.[7]

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[7] Under Md. Rule 8-607(a), we customarily assess costs against the losing party. This award is discretionary and, where the irresponsibility of the winning party creates the basis for appeal, we may order it to shoulder the costs. *See e.g., Md. Auto Ins. Fund v. Sparks*, 42 Md.App. 382, 396 (1979); *Andre v. Montgomery Co. Personnel Bd.*, 37 Md.App. 48, 65 (1977). In the instant case, we noted throughout that actions taken by the Department against the Mauks lead the Mauks to appeal the trial court's decision. We conclude that the Department's fault in this regard, recognized initially by the trial judge, requires that it should bear the costs of appeal.

MICHAEL AND SYLVIA MAUK	*	**In the**
	*	**Court of Appeals**
v.	*	**of Maryland**
	*	
DAVID A. ENGLE, Director of the Washington County Department of Social Services	*	**Petition Docket No. 489, Sept. Term 1994 (No. 1638, Sept. Term 1993, Court of Special Appeals)**
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ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ John C. Eldridge
Senior Judge

Date: February 16, 1995

IN THE CIRCUIT COURT FOR
WASHINGTON COUNTY, MARYLAND

EX PARTE IN THE MATTER OF THE PETITION OF THE WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES FOR GUARDIANSHIP WITH RIGHT TO CONSENT TO THE ADOPTION AND/OR LONG TERM CARE SHORT OF ADOPTION	ADOPTION DOCKET NO. 2633

TRANSCRIPT OF PROCEEDINGS

Court Room Number 2
Hagerstown, Maryland
July 2, 1992

The above-entitled matter came on for hearing in open court at 10:00 a.m.

BEFORE:

THE HONORABLE
DANIEL W. MOYLAN

APPEARANCES:

TIMOTHY S. GORDON, ESQUIRE
EARL W. BARTGIS, JR., ESQUIRE
ALEX BOGNAR, ESQUIRE
GORDON LYNN, ESQUIRE

Carol A. Miller, Court Reporter
Circuit Court for Washington County
Court House
Hagerstown, Maryland 21740
301-791-3180

* * *

(recess)

[p. 38] THE COURT: This Court is satisfied that the Mauks have standing to challenge the Constitutionality of the Department of Social Services' policy based upon Maryland law and the Maryland Constitution and the United States Constitution. Basically the Constitution has found in the 14th Amendment due process clause and the equal protection of laws clause, and I find that they have standing based upon the fact that they had Tiffany in their care and custody as a foster child from [p. 39] the time the child was five months of age until twenty months of age under the jurisdiction of the Juvenile Court for Washington County, and the jurisdiction was terminated when the parents of the child's parental rights were terminated by the Equity Court or, what do they call it now, Special, Civil Special Court, formerly known as the Equity Court, granted to David Engle, the Director of the Washington County Department of Social Services, long term guardianship with right to consent to adoption. It is not clear to me, Mr. Gordon, on the issue that you raised whether the Federal Civil Rights Act which could be brought in the State Court or in the Federal Court, what'd you call it, Section . . .

MR. GORDON: 1983, Your Honor.

THE COURT: 1983 is an appropriate vehicle or the exclusive vehicle to challenge this, but I haven't had time to research that. Suffice it to say that I think that the Mauks have the liberty interest sufficient to challenge the standing of this policy, and I therefore will grant their motion to intervene in these proceedings, and if they

attempt to challenge and raise this issue in these proceedings, it may be that that can be challenged and that 1983 is a better vehicle to raise this issue, or an exclusive vehicle, and if it's an exclusive vehicle, then I will deny their pleading or whatever they do to challenge this.

MR. GORDON: Is the Court reserving that issue, Your Honor?

[p. 40] THE COURT: Yes, because I don't think, I don't think it's been properly raised. This is simply a motion to intervene in these proceedings and I have granted the motion, and I think, basically, I've indicated the reasons I have is because I feel they have standing to raise these Constitutional issues which affect them personally and their liberty interest, but I'm leaving open as to the appropriate forum. Certainly they could challenge it in Federal Court if they choose to. They can challenge it in State Court if they choose to in this 1983 type of action, and perhaps they can challenge it in these very proceedings. If they file a 1983 action, it may be that the two proceedings will have to be consolidated because certainly the one would affect the other. I note in the case that I've looked at very hurriedly and relied upon to some extent in my ruling, in *McLaughlin v. Pernsley* case, out of the Eastern District of Pennsylvania in 1988, which is found in 693 Fed. Supp. at page 318, that that was, you know, these were the considerations that the Federal Court took into consideration and that there was a request in that proceeding for an injunction and so, all right, well that concludes the matter that's before me now. I think if, whatever you're gonna do, that is if the matter is brought to my attention, it's gonna be done in an expedited fashion because I do not, you know, I will

not violate any of the rules of procedure and give all parties the appropriate time to answer this, but I do not [p. 41] intend to have this sort of litigation involving a twenty two month old child languishing for months and months and months, so if you, whatever you file, counsel, be prepared to answer it within the time permitted by the rules. It seems to me like, well, I won't pre-judge, there are a lot of, I understand a lot more factual points that you want to develop, but there's also, you know, basically a legal argument that has to be made.

MR. GORDON: Your Honor, just for clarification purposes, the Motion to Intervene and Request for Hearing that's been filed in 2633 requests inter alia that there be an ability to intervene, but it also has additional and subsidiary relief requested. The Court's not granting that relief is it?

THE COURT: What is the other relief you're requesting?

MR. GORDON: Well, the other relief, Your Honor, that Tiffany be returned to the Mauk home pending adoption. That the Court declare the infant, Tiffany R be legally adopted child of Michael Mauk and Sylvia Mauk and such other and further relief.

THE COURT: No, I'm not gonna do that until there's a further hearing or a hearing on the merits. I simply today was addressing the question of standing and, as I've indicated, I do find that your clients have standing and therefore am allowing them to intervene

* * *

IN THE CIRCUIT COURT FOR
WASHINGTON COUNTY, MARYLAND

EX PARTE IN THE MATTER OF THE PETITION OF THE WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES FOR GUARDIANSHIP WITH RIGHT TO CONSENT TO ADOPTION AND/OR LONG-TERM CARE SHORT OF ADOPTION	*	2633 ADOPTION
MICHAEL MAUK AND SYLVIA MAUK INTERVENORS/COUNTER-PLAINTIFFS	*	
V.	*	
DAVID A. ENGLE, DIRECTOR, WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES	*	
PETITIONER/COUNTER-DEFENDANT	*	

MEMORANDUM OPINION AND ORDER OF COURT

Michael and Sylvia Mauk, as Intervenors/Counter Plaintiffs, seek to challenge the decisions of the Defendant, David A. Engle, Director of the Washington County Department of Social Services, in removing Tiffany R a foster child, from their foster care and placing her in the foster care of another couple preparatory to her adoption. The Mauks seek an interlocutory injunction pending this litigation in which the Mauks challenge the alleged racial discriminatory policies of the Washington County

Department of Social Services with respect to the placement of the children for adoption and foster care.

A Hearing was held on August 19 and 20, 1992, and the Court makes the following findings of fact:

MICHAEL AND SYLVIA MAUK

Michael and Sylvia Mauk, a married couple, are residents of Washington County, Maryland. They are Caucasians.

Their home is licensed as a foster care home and adoptive care home by the Washington County Department of Social Services. The Mauks' home was licensed for two foster children. They have had a total of five foster children over the years. Two of the foster children were later adopted by the Mauks. Keshia Janae had been in foster care with the Mauks for a year and four months. She was adopted by them on March 8, 1990, through the Washington County Department of Social Services. A second foster child, Michael Dustin, was adopted by them on June 13, 1991. He likewise was adopted through the Washington County Department of Social Services. Keshia is a black child and Michael Dustin, biracial (Caucasian and negro).

TIFFANY MARIE R

Tiffany R a black female child, was born on January 1, 1990, at the Washington County Hospital in Hagerstown, Maryland. She was addicted to cocaine at the time of her birth as a result of her biological mother's drug abuse.

On July 26, 1990, when she was six months of age, she was taken into the custody of the Washington County

Department of Social Services, along with her two brothers, Rodney Lynn and Justin Allen.

On September 27, 1990, she and her brothers were found to be children in need of assistance by the Circuit Court for Washington County. She was committed to the care and custody of the Washington County Department of Social Services and placed in the Mauk foster home. On that date, there was no foster home available to provide for all three of the children. Her brother, Justin, was placed with an ex-school teacher, Mrs. Darrah, on July 26, 1990, and her brother, Rodney, with the S on August 6, 1991.

When Tiffany was placed with the Mauks, she was still suffering from addiction to cocaine and had been the victim of sexual abuse. Her development was far below her chronological age and she was marasmic.

TIFFANY'S DEVELOPMENT AND RELATIONSHIP WITH THE MAUKS

The immediate Mauk family consisted of Sylvia Mauk, mother, Michael Mauk, father, Keshia Janae and Michael Dustin, adopted children.

Michael Dustin was one month old when placed with the Mauks. He, too, was a crack addicted infant who cried all the time. He was fed every two hours. Tiffany, too, was held a lot and they played with her a lot. She blossomed from a sick under-developed baby to a normal child. Her transformation was described by her pediatrician as miraculous.

A strong attachment developed between Tiffany and both foster parents. She was communicative with both.

They were responsive to the child's needs and provided a loving, engaging nurturing and warm environment for her.

Her pediatrician at first noticed the child's passivity, reticence and poor affect. He attributed the parental interactions (by the Mauks) in fostering and tutoring the child as contributing to the miraculous transformation.

Under the Mauks care, Tiffany, changed from being developmentally delayed to advanced for her age; she became a warm, loving child who was cared for and cared about. Over the year and a half period, the Mauks became her psychological parents and Keshia and Dustin became her psychological siblings. Tiffany and her two psychological siblings were accepted and loved by both parents and the grandparents. The Court found no evidence that the difference in race created any strangeness or prejudice based upon their racial difference.

TIFFANY'S BIOLOGICAL SIBLINGS

Tiffany's contact with her two brothers from age six months to approximately two years and three months was limited to approximately nineteen visits of several hours' duration between the three children while they had been in foster care.

S

The S like the Mauks, are a couple well-suited and talented to be exemplary parents. The principal difference is racial, – the Mauks being white, the S black. Tiffany was removed from the Mauk home and placed in the S home with her biological siblings on March 31, 1992.

The S are licensed for a maximum of six children. Both mother and father work, both are equally involved in caring for the children.

Tiffany has made an excellent adjustment in the S home and she continues to be a happy child. She enjoys a warm, loving relationship with the S and her two brothers.

WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES' DECISION TO REMOVE TIFFANY FROM THE MAUK HOME AND PLACE HER WITH THE S FOR PROSPECTIVE ADOPTION

In July, 1991, the Washington County Department of Social Services determined that the long term plan for Tiffany should be placement for adoption.

At a staff meeting on November 5, 1991, Washington County Department of Social Services decided against considering the Mauks for adoption of Tiffany, if the S would consider the possibility of adopting her along with her two brothers.

The Mauks, however, were not told that they were not going to be considered for adoption and Tiffany was allowed to remain in their home until March 31, 1992. She was removed from the Mauk home and was placed in the S home for the stated reason that there was a Protective Services investigation involving a possible abuse/neglect charge against the Mauks as a result of a near drowning incident. The investigation lasted for several days and was closed with a finding that there had been no abuse or neglect by the Mauks. Tiffany, however, was not returned

to the Mauk household after the investigation was closed, and has remained with the S ever since March 31, 1992.

THE WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES' DECISION AND THE CHILD'S BEST INTEREST

The Washington County Department of Social Services advanced three reasons for placing Tiffany with the S for adoption:

1. The preference for an adoption by parents of her same race.

2. The adoption with the S will have the effect of reuniting her with her biological siblings.

3. The Mauks were not suitable to adopt another special needs child.

The court makes the following findings of fact with respect to these three reasons:

RACIAL PREFERENCE

The Washington County Department of Social Services' policy is to give a preference for same race placements.

At the first staff meeting in November, 1991, in discussing what would be the best placement for Tiffany, the decision was made that "if we have a black family, that's the way we would go."

The Department acknowledged that the Mauks were allowed Keshia Janae and Dustin, a black and biracial child, because they couldn't find a suitable black family.

The Department decided that Tiffany would have a better chance of identity with a black family. The agency's first choice was a suitable black family. If there were not one available, only then would the Mauks be considered.

The Department had concerns about Tiffany growing up in family, community and schools where there were few black children. The Department was unable to state how race was used or to quantify the weight which was given to race in making its decision.

The Court has concluded from the evidence that race was the principal determinative factor and the only valid consideration which was advanced by the Department in support of its decision.

BIOLOGICAL SIBLINGS

The second reason advanced by the Department for its decision was reuniting Tiffany with her biological siblings.

Other than the first five months of life and the four months that Tiffany has been living with the S her contact with the siblings was limited to less than twenty visits of several hours' duration.

The Court finds from the evidence that Tiffany had bonded and become attached to Keshia Janae and Dustin. They had become her psychological siblings. Dr. Gregory Powell, a licensed psychologist, testified that at the age of young children (the age of Tiffany) living together with Biological siblings is not a major issue or consideration.

Based upon the placement of Tiffany, and her infrequent contact with her biological siblings during most of her young life, this reason for removing Tiffany from the

Mauk home was more in the nature of a pretext than genuine and deserving of little, if any, weight as a basis for the Department's decision. Specifically, the Court finds that to the extent that the Department's decision was based upon this factor it was not in Tiffany's best interest.

MAUKS WERE NOT SUITABLE TO ADOPT ANOTHER SPECIAL NEEDS CHILD

Here again, the Court does not find any support in the evidence to substantiate the Department's opinion that the Mauks could not handle another special interest child. The principal caretaker during Tiffany's infancy and that of Keshia Janae and Dustin, was Sylvia Mauk. Michael Mauk worked a full time job and was a Civil War Reenacter which took him away from the home approximately seven weekends a year. JoAnn Brennan, a witness for the Department, concluded from this and a complaint made by Sylvia that "Mike was not as involved as he should be." Secondly, Mrs. Brennan also testified that Sylvia complained that "Mike's family was prejudiced against black children." The Department did not investigate or seek to verify these complaints. Both were addressed in the evidence and the Court finds no substantiation for either of these complaints.

The evidence, which was quite to the contrary persuades the Court that Michael, was an excellent father to the three children. His father expressed a slight preference for his grandchild, Dustin, because he was a boy. The Department erroneously translated that into a preference for Dustin because he is biracial, over Keshia Janae, who is black.

Next, the Department expressed their concerns that Sylvia would be overwhelmed by having another special needs child in their family. Interestingly, she had not been overwhelmed and the Mauk family had done an exemplary job in parenting Tiffany and the other two children for a several year period.

Also, the Court finds it interesting to note that for purposes of funding, the Department did not consider Tiffany a special needs child. The Court finds from the evidence that the Department had no real concerns about the care of Tiffany with the Mauks. In fact, the Department approved Dustin for adoption by the Mauks just four months before Tiffany was removed from the home.

TIFFANY'S BEST INTEREST

The one basis on which the Court finds that the removal of Tiffany from the Mauks to the S could be in her best interest is that of racial preference. The Court has agreed to schedule an evidentiary hearing within sixty (60) days of today. The Court finds that none of the other reasons advanced by the Department for Tiffany's removal support the Department's decision.

Tiffany was actually removed from the Mauks on March 31, 1992, as a result of an abuse/neglect complaint. There was a near drowning incident while she was swimming at another resident's home. The Department conducted an investigation over a several day period and found there was no abuse or neglect. However, the favorable decision was not announced to the Mauks for several weeks and Tiffany was not returned to the home.

The Department did not consult with Tiffany's pediatrician or any other outside experts regarding the risks of removal of Tiffany from the Mauk home. Tiffany had resided with the Mauks more than twenty months prior to her removal and for more than a year after Tiffany had been found by the Court to be a child in need of assistance. Dr. Gregory Powell testified that there are numerous risks in removing a child from a suitable home and such risk should not be taken except where there is an extremely good reason.

Dr. Ronald Keyser, the child's regular pediatrician, testified that it was wrong to disrupt the long term relationship between Tiffany and the Mauks, including Keshia Janae and Dustin.

The Court finds, based upon the experts' testimony presented here, that the Department incurred substantial risk in disrupting a long term familial relationship that had developed between Tiffany and the Mauks.

This Court is persuaded by a careful examination of the evidence and the findings of fact I have made that racial preference is the only legitimate reason which could support a finding that the removal of Tiffany from the Mauk home was in her best interest.

The Court further finds that the other two reasons advanced are disingenuous. I find from the evidence that the other reasons and complaints about the Mauks are a pretext and offer no support for the Washington County Department of Social Services' decision that the removal of Tiffany from the Mauk home was in her best interest.

The Court will schedule this case for further proceedings as follows: The Washington County Department of Social Services' Motion to Dismiss the counter claim within two to three weeks. If the Court denies the Motion to Dismiss, a further evidentiary hearing will be held on the issue of whether the policy on inter racial foster care and adoptions, as implemented in this case, violates the civil rights of Sylvia and Michael Mauk and Tiffany R under 42 U.S.C., Sec. 1983.

The Court finds that the decision to remove Tiffany from the Mauk home under the circumstances of this case was not in the child's best interest at the time the decision was made. The racial preference policy principally presents future concerns about racial identity and family, community and school concerns in the future. Simply put, the Court found no evidence to suggest that the removal of Tiffany from the Mauk home was in the child's best interest, based upon any conditions or circumstances then existing.

/s/ Daniel W. Moylan
Daniel W. Moylan
Associate Judge

Dated: August 31, 1992

IN THE CIRCUIT COURT FOR
WASHINGTON COUNTY, MARYLAND

MICHAEL MAUK and SYLVIA MAUK, Individually and as Next Friend for a Child Designated for the purposes of this case as T.R., and as Taxpayers of THE UNITED STATES AND THE STATE OF MARYLAND,

Plaintiffs

CIVIL NO. 18,155

VS.

DAVID A. ENGLE, Director WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES,

Defendant

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 3
Hagerstown, Maryland

April 27, 1993

The above-entitled matter came on for hearing in open court at 11:40 A.M.

BEFORE:

THE HONORABLE DANIEL W. MOYLAN,
Associate Judge

APPEARANCES:

EARL W. BARTGIS, JR., ESQ.
MILES & STOCKBRIDGE, On behalf of Plaintiffs

TIMOTHY GORDON, ESQ. and
SHELLY E. MINTZ, ESQ.,
Assistant Attorney General,
On behalf of Defendant

ROBERT B. STONE, ESQ.,
On behalf of Foster Parents, S

ALEX BOGNAR, ESQ., On behalf of Child, T. R.

GERALDINE M. LUM, Court Reporter
Circuit Court for Washington County
County Courthouse
Hagerstown, Maryland 21740

* * *

[p. 32] COURT'S RULING

THE COURT: In announcing my decision, I will attempt to explain the basis or reasons on what I am deciding and will also attempt to define any issue that I'm not deciding as unnecessary to rule on the Motion to Dismiss the civil rights [p. 33] proceeding under § 1983.

The thrust of the plaintiffs' case is that the Director of the Washington County Department of Social Services, acting in his capacity as Director of that agency, violated the civil rights of both the child, T.R., and the parents or excuse me, the foster parents, Mr. and Mrs. Mauk in the manner in which they applied or misapplied the State law.

As I understand their argument, and regardless as to whether I understand it or not, I do find that there is no basis for a challenge of the State law. There is no feature or provision of the State law in the policy which it enunciates which violates the civil rights and constitutional rights of equal protection of law under the Fourteenth Amendment of foster parents in cases of consideration of

transracial adoptions or adoptions by parents of the same racial heritage as the prospective foster child.

I do not understand this case to be, and I find no basis to treat this case as a class action type of suit, which would have any applicability to other foster parents similarly situated to the Mauks in this case, and therefore, the only thing I am called upon to decide is . . . Well, before I go on to say what I'm called on to decide, I do find that the Mauks do not have standing to bring suit on behalf of all children or any other children similarly situated to T.R. in [p. 34] in this case or on behalf of all foster parents or any other foster parents other than themselves. So I am narrowing the focus of my decision in this case to a consideration of the manner in which the local Washington County Department of Social Services applied the State law in the circumstances of this case.

This suit is brought against the Director in his official capacity as Director of the Washington County Department of Social Services and not against him as an individual. Based upon the complaint, there is no basis to bring this action against Mr. Engle in his . . . as an individual . . . because it is patently clear from the proceedings that whatever he did, rightly or wrongly, he did in his official capacity as Director of the Washington County Department of Social Services.

What it is that he's charged with doing is removing T.R. from the foster home of Mr. and Mrs. Mauk and secondly, placing Tiffany R in the foster home of Mr. and Mrs. S and consenting to the adoption of Tiffany by the S and rejecting the consent or withholding the consent of his right to consent to adopt by Mr. and Mrs. Mauk.

Now among other things, this is a suit for monetary damages and the law is quite clear that monetary damages are not recoverable from a State official acting in official capacity under § 1983, and this is clear in both the *Hafer v.* [p. 35] *Melo* case in 112 S.Ct. Rep. 358 (1991 decision) and *Will v. Michigan* in 491 U.S. 58, (a 1989 decision of the Supreme Court).

Plaintiffs argue that a local official, as opposed to a State official, may be sued for monetary damages under § 1983 and they rely upon the recent case of *Ritchie v. Donnelly* in 324 Md. 344 (1991 opinion of the Court of Appeals).

The plaintiff argues that David Engle was not acting in his State capacity when he failed to apply the State law correctly but rather applied local policy. The Court finds this argument to be completely specious and without merit. It, in effect – I've read the Sheriff's cases and I think they deal with the understandable matrix of duties that a sheriff has, some of which are those of a state official and others as a local official – but it is clear that the Social Services Department is a State agency and that Mr. Engle, as Director of it, is a State official, and that's found in the Annotated Code of Article 88 A, sections 3 through 14.

There is, rightly or wrongly, applying or misapplying, State policy, the actions that Mr. Engle, and decisions that he made, were those in his capacity as State official and he was sued in his capacity as a State official and not individually, and I find no merit to the argument that in misapplying . . . in the allegation that he's misapplying the State law . . . that he thereby becomes a local official

and not a State official, so that is one of the bases, at least as to the claim for [p. 36] monetary damages, the Court will dismiss the claim for monetary damages on that basis.

Now as to the other issues. I have already decided that this does not constitute and that there is no basis for an attack on the State law and policy and that the § 1983 action is limited to the more narrow issue as to whether the Washington County Department of Social Services misapplied the State law in removing Tiffany R from the foster home of the Mauks and refusing to consider them or rejecting consideration of them on an invalid basis. That's the contention and that's the narrow issue that the Court see [sic] for this case.

Now, in order for there to be a § 1983 action, there must be involved a depravation of a constitutional right or a liberty interest. The majority or the plurality opinion, or the majority opinion, whichever it should be called, in the *Smith v. Organization of Foster Families*, in 431 U.S. 816, a 1977 Opinion of the Supreme Court, did not hold that foster parents had a liberty interest in the continuation of foster care or in the right to adopt a child whom they have had in foster care.

The three justices in the concurring opinion, Rehnquist being one of them, and two others, urged that that decision be met squarely and that it was not, and indicated in the opinion of those three that there was no liberty interest in the continuation of foster care or in the right of a foster [p. 37] parent to adopt.

Since that case, the Federal Court of Appeals, in the following Circuits have so ruled: the Third Circuit, the

Fifth Circuit, the Sixth Circuit, the Seventh, the Ninth and the Tenth, and more recently, apparently, the Fourth as well.

While those decisions are not binding on this Court, they are pretty persuasive authority because the Federal Courts of Appeals have uniformly held that there is no liberty interest in the continuation of foster care or the right of foster parents to adopt.

Mr. Bartgis argues to me . . . I think it was § 5-525, the priority section . . . and it well may be, Mr. Bargtis [sic], that there is a violation of a State statute and it well may not be. I'm assuming for purposes of deciding this motion that – I'm looking at it in the light most favorable to your clients – and in doing that, I'm assuming without deciding, that there is a priority established by this Maryland statute and that the priority is in favor of your clients and that the Washington County Department of Social Services violated that priority. But even looking at those matters in the light most favorable to your clients, as I must in a motion hearing such as this, I nonetheless reached the conclusion that a violation of a state statute establishing a priority, if indeed there is one, and I'm assuming there is, without deciding, does not create a [p. 38] liberty interest in the continuation of foster care or in the right of a foster parent to adopt which would constitute a depravation of a constitutional right; and for that reason, I do not find that your clients have a cause of action under the 1983 section of the Federal Law.

I attempted to unravel the standing question and I think the standing question I had narrowed to these

foster parents in this case and I want to make that perfectly clear. I do not find any basis in this suit for your clients to take on the mantle of a class action or being a representative party in a class action for several reasons, one, that has not been pled but on a substantive level, the Court has found that the Maryland statute is valid from a constitutional standpoint and that there's no attack on the Maryland statute and I can't assume, although I can assume without deciding, that the Director and the Washington County Department of Social Services misapplied the State law in this case. There's no basis for me to assume that this is a policy and a practice which they will follow in other cases, and therefore, to apply this case . . . there's no standing except as to the parties themselves.

Now I can't unravel that question as to whether they have standing from the third question but, obviously, when I answer the third question, that they do not have a constitutional right or a liberty interest based upon the current state of the law as the Court understands it to be and as I am bound [p. 39] to follow, even if I assume, without deciding, that the application by the Washington County Department of Social Services of the State law in this case, under the circumstances of this case, constitutes a violation of equal protection of law or constitutes a violation of the constitutional principles enunciated in the Fourteenth Amendment based upon these Circuit Court of Appeals' decisions, I am persuaded that the Mauks, although they may have some priority under a State statute, do not have liberty interest which gives them standing based upon a depravation of a constitutional right of theirs.

For those reasons, the Court is going to grant the Motion to Dismiss.

There's also a Motion to Stay and that motion is moot based upon my ruling so I will deny the Motion to Stay.

Now does anybody have any question about the decision that I've made?

MR. BARTGIS: Pardon me, Your Honor. I know that you dismissed it but you didn't comment on the Mauks' right to bring an action on behalf of the child for the violation of the child's civil rights.

THE COURT: No, I didn't. A couple of things occur to me and the case that you have cited to me that I've looked at and the language in the Supreme Court Opinion, it's the *Smith* case that we keep referring to, a 1977 opinion, indicates that a child should be represented in these proceedings and indicates [p. 40] that, in this case, the Department or agency would have a conflict of interest in representing the child. The Supreme Court indicated the right of the child to have notice and to be represented and have the opportunity to represent his or her views in these types of cases.

A couple of thoughts occur to me, and that is under the circumstances of this case, the Mauks, based upon the action of the Department of Social Services or former foster parents as opposed to current foster parents of Tiffany R; and, secondly, that independent counsel was appointed to represent the child in these proceedings and that counsel has participated in the proceedings . . . I say these proceedings . . . I don't mean this action . . . but in

the cross adoption case, independent counsel was appointed to represent her.

Now I understood this case to be one by the Mauks and perhaps I missed the point that you're raising. You also sued "as next friend on behalf of Tiffany R" and so forth. Your argument on that was that she had a liberty interest that was violated by the application of this local policy?

MR. BARTGIS: Correct.

THE COURT: And what was your argument on that point?

MS. MINTZ: Our argument, Your Honor, was that a number of the same cases specifically held that the foster child also has no liberty interest in maintaining the continuation of that foster family's relationship. The cases have addressed [p. 41] both the foster parent and the foster child's interest in the continuation of the relationship and held that there is no liberty interest on the part of the foster child.

THE COURT: You disagree?

MR. BARTGIS: Your Honor, I completely disagree. I disagree first that these Circuits ever held that there was no liberty interest per se. I've read to you from at least . . . for one thing, the Third Circuit had to have found that there was a liberty interest because they affirmed the *McLaughlin v. Pernsley* case, which indeed found a violation of equal protection. None of these cases, that I'm aware of, ever addressed the child's right at all.

MS. MINTZ: They do address . . .

said there may be a liberty interest, it just has to look at the various situations, doesn't strictly prohibit a liberty interest at all.

THE COURT: Alright. I'm prepared to rule. I didn't articulate the reasons for the ruling perhaps as well as I might have, but I'm satisfied that a foster child, like a foster parent, does not have a liberty interest in the continuation of the foster child relationship with particular foster parents or in the opportunity to be adopted by particular foster parents, and therefore, I do not find a depravation of a constitutional right on behalf of the foster child, [p. 42] Tiffany R, in this case.

Now are there any other questions about the decision that I've made?

MR. BARTGIS: So we can have a clear record, Your Honor, do you want to affirmatively rule on the Motion for Partial Summary Judgment? I mean, it's pretty obvious but you may . . . obviously, it would be denied . . .

THE COURT: Well, that would be moot. I'm not going to rule on that because I've granted . . . I don't know that I've gone outside of the record, perhaps I have. There is a provision in the Court of Appeals that is you argue things to me outside of the record and I rely on things outside of the record, that then the proper procedure is to deal with this as a motion for summary judgment rather than a motion to dismiss, but I wasn't aware that we had gone outside of the record.

MR. BARTGIS: What I meant, Your Honor, is that I had filed in the same action, although it was not before the Court today, a Motion for Partial Summary Judgment. I presume, since you're dismissing the case, that you would deny that. Obviously, it's . . .

THE COURT: Yes, I will. It will be moot. There is no case. I'm dismissing the case so therefore, there's nothing for me to rule on. Anything else, Mr. Bartgis?

MR. BARTGIS: No, Your Honor.

* * *

IN THE CIRCUIT COURT FOR
WASHINGTON COUNTY, MARYLAND

EX PARTE IN THE MATTER OF THE PETITION OF THE WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES FOR GUARDIANSHIP WITH RIGHT TO CONSENT TO ADOPTION AND/OR LONG-TERM CARE SHORT OF ADOPTION

MICHAEL MAUK AND SYLVIA MAUK

INTERVENORS/COUNTER-PLAINTIFFS

ADOPTION
NO. 2633

V.

DAVID A. ENGLE, DIRECTOR, WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES

PETITIONER/COUNTER-DEFENDANT

TRANSCRIPT OF PROCEEDINGS ON MAY 6, 1993

Circuit Court
Hagerstown, Maryland

The above-entitled case came on for Hearing and Court's Ruling in Open Court at 1:30 P.M.

BEFORE:

THE HONORABLE DANIEL W. MOYLAN
Judge

APPEARANCES:

TIMOTHY GORDON, ESQ.
SHELLY E. MINTZ, ESQ.
ROBERT B. STONE, ESQ.
ALEX BOGNAR, ESQ.
EARL W. BARTGIS, JR., ESQ.

LUCILLE E. MOWEN
Court Reporter
Circuit Court for Washington County
County Courthouse
Hagerstown, Maryland 21740

* * *

[p. 55] COURT'S RULING

BY THE COURT:

I have gone over the various considerations that have occurred to me during the several hearings that have taken place in this case, and have made extensive findings of fact; and the only thing new here is this very lengthy and detailed report of Barbara DiCocco, who is a Court expert, which goes on for some 43, 45 pages and her testimony. And I come down and I think because of the tremendous importance of this decision to Tiffany, who is represented by counsel, and to the two families, the Mauks and the S, I think it's important to set forth my thought processes and [p. 56] the decision that I had made, and to be as up front with it as I can.

The first point is that I think that the Department of Social Services did a grave injustice in removing Tiffany from the Mauk home in March of 1992; and basically the reason I think that, is because the child had been there from age seven months until twenty-seven months, a

period of some twenty months, and had gone from a developmentally delayed child, who was a crack baby who was experiencing lots and lots of problems into what her pediatrician described, Dr. Keyser, as a child who was not only caught up but was ahead of the children of the same age as herself at the time when this had occurred.

The Department of Social Services had placed her, a black child, with the Mauks, who are a white couple and had likewise placed two other children with them, one biracial, a black and white, and the second one was a black child. And Mrs. Mauk was the person or the catalyst in the family who was particularly adapt and gifted in working with young children. And what had taken place during those twenty months was quite remarkable. Now, also during those twenty months, it became apparent that the best interest of the children was not to reunite them with their natural parents and, therefore, it became apparent that the permanency planning was that the child be placed for adoption. And [p. 57] even after that decision was made and after the initial meeting in November of 1991, the Department continued Tiffany with the Mauk family and at the time were looking for a black family. And I think from the testimony, as I have already found, was quite clear that they were going to place her with the Mauks unless they found a suitable black family. Well, indeed they did. They found a very suitable family, the S; and the S already had Tiffany's two siblings as foster children and I have since granted an adoption to them of those two children while these proceedings have been going on, and they evidenced a desire to have Tiffany as part of their family and to adopt her.

Secondly, the manner in which the Department of Social Services removed Tiffany from the Mauk home constituted another aspect of what I have described as a grave injustice. There was an accident where the child nearly drowned and at that time the Department of Social Services, in their wisdom, decided, as is their policy, to remove the child and do an investigation to determine whether there was any neglect or fault on the part of the Mauks which resulted in this accident. The investigation took place and the Mauks were given a clean bill of health, as it were, and were exonerated and found not to have caused this. And at a very critical time in this child's life, according to the [p. 58] experts, the Department chose to use that as the time to remove her from the Mauk home and to continue her in the S home. And I say a grave injustice because their plan to look for a suitable black family was going on without the knowledge of the Mauks. I don't think they were up front about it and I think they should have been, but they weren't, and that fortuitous event or accident was used as a basis or an excuse to remove the child, even though their own investigation showed that that certainly was not a basis to remove the child. And Tiffany was so bonded or, if that's not the correct word, attached to Mrs. Mauk, in particular in her family. To remove her at that time constituted an aspect of the grave injustice of which I speak.

The third aspect which persuades me that this was a grave injustice was the Department of Social Services again, I believe, was disingenuous and was not up front in their rationale or reasons for their decision. And many of the reasons advanced, I won't go through them all again now because I've done it at previous hearings, but

basically I am persuaded and I have found as a fact were pretextual. And the only one that gave me some trouble was the reuniting of Tiffany with her siblings. And I've looked at that very carefully throughout these proceedings and it certainly . . . the reason why I think even that reason was disingenuous was [p. 59] the fact that during the twenty months while Tiffany was with the Mauks, the visitation between her and her two brothers was pretty sporadic or spotty and it certainly was not given any great attention or importance at the time, and then all of a sudden it became a principle reason for the basis for the adoption. And I wondered about that in listening to the testimony of all of these experts, Dr. Powell and Dr. Keyser and Ms. DiCocco and several others. They talked about the fact that siblings is a much broader concept than a blood relationship of brother and sister but it's more a concept of your siblings are the children who are your contemporaries who you grow up with, whether they be half-brothers or half-sisters or whether they be black or white or what have you. According to the experts, when you grow up in a family unit, the people that you grow up with are your siblings, certainly in an emotional sense. And the sibling that Tiffany is closest to, among all these two brothers who are in the S and part of it and Janay [sic] and Dustin, Janay [sic] is the one that she is the closest with.

The other reasons that the Department advanced, you know, they ought to be embarrassed based upon that, the things about marital discord. I don't see any evidence of that in the case; and taking one remark or grumble, they should have been in the Army with me if they wanted to hear some griping. But they take one chance

remark and turn it [p. 60] into racial prejudice in the family and things like that, which I thought to do that was very unfair, very disingenuous and again was part of the injustice. I think the reason they made that decision was their belief that it was in the child's best interest that she be in the same race home for adoption and not a transracial adoption. And the other things were just advanced as reasons and I think they were unworthy of the Department of Social Services and I hope that they are more careful.

I recognize, as you said, Mr. Gordon, they make these decisions they don't have the advantage of experts upon experts and all the testimony that I have heard in this; but I certainly think when they make decisions as weighty and as important as this one, certainly it would have behooved them. I don't accept this fact that they are the experts that I heard here and I heard from a lot of other experts, psychologists and medical doctors and sociologists and the like. And these people I certainly think when they're dealing with this issue of transracial adoption, it would merit a little bit of expert advice and opinion in looking at this before the fact rather than after the fact.

The final reason that I think their decision was wrong and created a grave injustice is based upon the testimony of a number of the experts; and I've made specific findings of fact on this and I haven't seen anything in Ms. DiCocco's [p. 61] report that has caused me to change my belief. In fact she's one of the ones who says the same thing and that is, that once the, some of them call bonding and apparently the more accurate term is attachment, but once this attachment takes place, to tamper with it or

to interfere with it or to remove it is just plain out wrong. It's something that shouldn't happen and it's something that did happen. And as I said to Mr. Bartgis, all the experts who have testified in this case in urging me not to remove the child from the S home, all the reasons that they have advanced were equally valid and shout that the child should not have been removed from the Mauk home when there wasn't any reason or basis to do it, other than the fact that it would have constituted a trans-racial adoption rather than a same-race adoption.

The decision was made. It was made in March of 1992, and we're now fourteen months later. And another thing that was done, which I think was unfair and unjust, was that after the child was removed there was no contact or visitation with the Mauks, including this period of recuperation from a near-drowning accident, until the Court Ordered it in, I think, August or September of 1992. But since March 1992 Tiffany has been in the S home primarily and after this interruption of about four months or so other than with occasional visitation at the Mauk [p. 62] home. It is quite evidence that there is still a strong attachment or bonding to the Mauk family, particularly Mrs. Mauk and Janay [sic].

Now, on the other side of the picture, the S home is outstanding and it is a black home and they have some foster children there and they have the two other siblings, blood siblings, of Tiffany's that they have adopted and they have some other children of their own; and to simply say they are outstanding doesn't do it justice. It is remarkable what these people . . . what they are and what they represent. And I was particularly struck, well, by both of them. Once compliments the other and in their

differences but their commitment to what they do and the values that they have and the type of home that they have. And it is quite evidence that Tiffany has flourished in their home and that she has become and is an integral part of that family unit. And nobody has advanced any problems or fault with them or what they do and so, therefore, you have a situation where she has gone from something good to something that is good or something that was outstanding she's gone to another situation which was outstanding. And an important factor to me is not simply to sit here and say nice things about the Mauks or the S, because a lot [sic] times Tiffany and the experiences that she has had will dictate whether it would work or not and whether the [p. 63] separation from the Mauks, if it hadn't of worked, you know, we'd all know about it and we wouldn't be here. But it has worked and she has flourished being in that home and she's been there now since March of 1992. And my job is to simply decide what is in her best interest. And I can't countenance what the Department of Social Services did in this case and I've made that clear; and everytime we have a hearing, they're probably getting tired of hearing me talk about it, but I do that nonetheless because I don't expect that everytime they make a decision that it be one that I am going to agree with it, but I just think that decisions of this importance deserve the time and attention and the care and the professional guidance which did not occur in this case.

But I am struck by the fact everything that I have railed against that they have done, that same scenario or situation has been set up again. And were I to remove Tiffany from the S home, I'd be doing the very thing that I

have been so adamantly criticizing the Department of Social Services for having done back in March of 1992. I don't like to play God and I don't think that the department of Social Services likes it either. I don't think anybody enjoys making hard or difficult decisions. But I certainly like to approach these situations very, very cautiously and very thoughtfully and I think I have with this case.

[p. 64] I've listened to so many experts in this case alone and I've tried to gain some insight, you know, from each one of them; and the certain overriding themes come out in this case. And the one overriding theme that comes out to me, and it's the focal point of this case, and that is that a child not be removed from a family unit or situation, unless there are good and compelling and valid reasons to do so. And that's where they went wrong and that's what I would have to do if I were to remove Tiffany and return her to the Mauk home. And I would have to do it in face of all this expert testimony and the experts telling me that these attachments don't just happen. I mean, now they happened for Tiffany but it sounds like – well, you lose a situation here and then you attach over there; and how completely dependent as human beings we are on being able to be emotionally attached and it's not a birth right or something that you can count on and it's certainly a fragile thing and it is a central thing to the child's development and it's not something that you should be playing games with. And I'm afraid were I to do that now, that that's just what I would be doing.

The child is attached and is an integral part of that family and I think in her best interest I'm not prepared to take the risk and move her back to the Mauk home and

say, you know, the . . . I notice Ms. DiCocco talked about three [p. 65] periods of time the loss that she experienced when she was taken away from her birth parents and maybe that wasn't too important. And then the second loss when she was taken away from the Mauks at twenty-seven months of age and the way that was done, particularly after she had almost drowned and she was removed from Mrs. Mauk, which makes absolutely no sense at all to me and is one of the reasons why that removal I find was not in her best interest at that time but then to again remove her today from the S home would be a third time for her and I'm not prepared to do that. I think it would be wrong. I think it was wrong when the Department of Social Services did it and I think it would be wrong if I were to do it now.

And as much as and as passionately as I feel about the injustice that was done to her by this decision when the child was twenty-seven months of old, twenty-seven months of age, I think it would be equally unjust were I to make the decision now and to remove her yet again from a situation.

Finally, I want to say that I place particular importance or weight in this case in the opinion of Mr. Bognar, who is an attorney who was appointed independently of the Department of Social Services or the S or the Mauks, to represent the child. And I listened intently to where he came down on all of this and I did the same thing while I studied and listened to Ms. Barbara DiCocco. [p. 66] And they both recommend to me that I authorize the adoption into the S home.

The racial, same-racial makeup, as opposed to a transracial adoption, is a factor which the Court has considered. However, I don't find it to be in the decision that I'm making the overriding factor. I see some advantages in the child being raised in a same-race family because of the world that we live in and I see some advantage there; but when I look at it from the way that these experts tell me to, it may be important in the future but I don't have a crystal ball and I'm not supposed to look into the future, I look at the here and the now. And, apparently, with a three-and-a-half year old child, racial prejudice or these factors are not important and they weren't important when she was twenty-seven months of age; but what was important in the overriding consideration to me and the one that persuades me of the child's best interest is the attachment that she has realized in that family and the fact that there are just no negatives there and so I'm not prepared to change. I don't think that would be in Tiffany's best interest.

So I will sign an Order authorizing her adoption to Mr. and Mrs. S and I'll deny the Adoption Petition of Mr. and Mrs. Mauk, Michael and Sylvia Mauk. I am not going to encourage the parents with respect to adoption, with [p. 67] respect to visitation because one, legally it's not a decision or prerogative that I have to make. And, secondly, I think, as you've said, the parents who win the Adoption Petition, have the responsibility as parents and they're the ones who have to make the decision and have to live with it. I don't know what their decision is and I don't want to know and I'm glad that I don't have to make the decision. If I were in their shoes, it would be a very difficult decision to know what to do. But I think

that's something, some responsibility what they have and I'm sure they'll think it through thoughtfully and, hopefully, whatever they do, will be the right decision.

* * *

EX PARTE IN THE MATTER OF JOHN RICHARD S and FRANCES ELIZABETH S HIS WIFE, FOR THE ADOPTION OF THREE MINOR CHILDREN	: No. 2633 ADOPTIONS : : IN THE CIRCUIT : COURT FOR : WASHINGTON : COUNTY, MARYLAND :

DECREE
(Filed May 8, 1993)

The Petition in the above entitled cause, affidavit thereto, and the Exhibits filed therewith, having been read and considered, and said cause having been submitted for a Decree in the Circuit Court for Washington County, State of Maryland, and after a hearing on cross-Petition for Adoption, and the Court having been satisfied after careful examination that the best interest and welfare of the infant child named in the Petition will be promoted by her adoption by the Petitioners, and the said infant child being of insufficient age and capacity to give an understanding assent thereto, no such assent therefore being required, it is thereupon this 6 day of May, A.D., 1993, by the Circuit Court for Washington County, State of Maryland, sitting as a Court of Equity,

ADJUDGED, ORDERED AND DECREED that the infant child, TIFFANY MARIE R named in these proceedings, be, and she is hereby declared to be the adopted child of the petitioners, JOHN RICHARD S and FRANCES ELIZABETH S his wife, as prayed in said Petition, with all the rights, privileges and incidents of such adoption as provided by the Public General Laws of the State of Maryland; and it is further

ADJUDGED, ORDERED AND DECREED that the correct, proper and legal name of said infant child be, and the same is hereby changed to TIFFANY JANELL S and it is further

ORDERED that the Petitioners pay the costs of these proceedings.

/s/ Daniel W. Moylan
JUDGE

True Copy

Test. /s/ Dennis Weaver
Clerk

IN THE CIRCUIT COURT FOR
WASHINGTON COUNTY, MARYLAND

MICHAEL MAUK and SYLVIA MAUK Individually and as Next Friend for a Child Designated For the Purpose of this Case as T.R.	*	
Plaintiffs	*	Case No. 18,155
v.	*	
DAVID A. ENGLE, DIRECTOR, WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES	*	

* *

ORDER
(Filed May 26, 1993)

Upon consideration of defendant, David A. Engle, Director, Washington County Department of Social Services' motion to dismiss plaintiff's complaint and opposition thereto, and upon hearing thereon, it is, by the Circuit Court for Washington County this 25th day of May, 1993

ORDERED, that defendant's motion to dismiss be and the same hereby is GRANTED and it is further

ORDERED, that plaintiff's complaint be and the same hereby is DISMISSED WITH PREJUDICE, and it is further

ORDERED, that defendant's motion for stay and plaintiff's motion for partial summary judgment are, as a result of this court's dismissal of the complaint rendered moot.

/s/ Daniel W. Moylan
DANIEL MOYLAN, JUDGE
Circuit Court for
Washington County,
Maryland

Test. /s/ Dennis Weaver
Clerk

(2)

No. 94-1876

FILED
JUN 12 1995
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1994

MICHAEL MAUK AND SYLVIA MAUK,
Petitioners,

v.

DAVID A. ENGLE, DIRECTOR OF THE WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
Respondent.

On Petition For A Writ Of Certiorari
To The Court of Special Appeals of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Maryland Court of Special Appeals' finding that the trial court did not abuse its discretion in denying Petitioners' petition to adopt Tiffany R. and in approving Tiffany's adoption by the S. family rendered Petitioners' claims for declaratory and injunctive relief moot.

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No. 94-1876

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On Petition For A Writ Of Certiorari To The Court of Special Appeals of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

On December 13, 1991, the Washington County Department of Social Services (hereinafter "WCDSS" or "the Department") filed in the Circuit Court for Washington County, Maryland, a petition for guardianship with the right to consent to adoption on behalf of Petitioners' foster child, Tiffany R., and her biological siblings. (App. 2). The court granted that petition on June 23, 1992. While that petition was pending, WCDSS removed Tiffany from Petitioners' home, where it had placed her as a foster child, and placed her with Mr. and Mrs. S., who were caring for her two brothers. (App. 2, 8). Tiffany, her brothers, and the S. family are African-American. Petitioners are white.

The Petitioners intervened in the guardianship case and filed a petition to adopt Tiffany. Mr. and Mrs. S. also filed a petition to adopt Tiffany, as well as her two siblings. WCDSS consented to the S. family adopting all three children. On May 6, 1993, the circuit court decreed the adoption of Tiffany by Mr. and Mrs. S.[1] (App. 10).

In granting Mr. and Mrs. S.'s adoption petition, the trial court acknowledged that the "same-racial makeup" of Mr. and Mrs. S. and the children was a factor, but not the "overriding" factor. (App. 19). The court cited, as the determinative factor, the expert testimony suggesting that removing Tiffany from the S. family would have a negative impact on her development. (App. 19). The Maryland Court of Special Appeals upheld the lower court's decision, finding that the trial judge made "a well-informed and rational decision when it concluded that Tiffany's interests would best be served by adoptive placement with the S. family." (App. 19-20).

The Petitioners do not seek review of the adoption decision. Instead, they seek review of a companion case that they filed under 42 U.S.C. § 1983 on January 21, 1993, also in state court, individually, as taxpayers, and as next friends of Tiffany R.,[2] challenging the Department's decision to place

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[1] The S.s' adoption of Tiffany's biological brothers was finalized in December, 1992.

[2] Petitioners lack capacity under Maryland law to sue on Tiffany's behalf. When a minor has an actionable claim, she may sue only "by a guardian or other like fiduciary, or, if none, by next friend. Md. Rule 2-202(b) (emphasis added). Petitioners are not Tiffany's guardians or fiduciaries. The Maryland Court of Special Appeals correctly found that the decree of adoption made Mr. and Mrs. S. her "definitive guardians." (App. 26). The court also correctly noted that the Petitioners' "own interests in the outcome of the § 1983 litigation, in fact, may conflict with Tiffany R.'s best interests." (App. 26).

Tiffany with her siblings in the S. home. The gravamen of this action is that, by placing Tiffany with an African-American family, WCDSS violated their right to substantive due process and equal protection under the Fourteenth Amendment of the United States Constitution.

In their § 1983 action, Petitioners sought a declaration that the Department's refusal to consent to their adoption of Tiffany constituted discrimination. They also asked for injunctive relief affirmatively ordering the local department to consent to their adoption of Tiffany. Finally, Petitioners requested that WCDSS be enjoined from any future use of race as a decisive or primary factor in adoption decisions.

The Maryland Court of Special Appeals found that, because Tiffany was no longer available for adoption, "the injunctive and declaratory relief sought by [Petitioners] had become effectively moot . . . ." (App. 30). The court also found that Petitioners' request for prospective relief on behalf of persons other than themselves was similarly non-justiciable because they alleged, at most, only a "misapplication of" Maryland law peculiar to their case. (App. 21, 27). Petitioners never disputed the constitutionality of Maryland's statutory scheme that prohibits adoption agencies from placing children based solely upon their race, but allows an agency "to consider race [among other factors] when making adoptive placement recommendations." (App. 27). Md. Fam. L. Code § 5-311(b)(2); Code of Maryland Regulations (COMAR) 07.02.12.12A and B (prohibiting an agency director from withholding consent to adoption solely on the basis of race).[3]

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[3] In their petition for the writ of certiorari, Petitioners - for the first time - appear to be asserting that <u>any</u> consideration of race in adoption or foster care decisions is unconstitutional. (Petition at 13, 19, 20). That issue was never presented to or decided by the lower courts. In the courts below, Petitioners argued only that WCDSS impermissibly used race, not as the sole factor, but as the primary or decisive factor, in their case. This Court has

(continued...)

Finally, the court rejected the Petitioners' efforts to assert the rights of the general foster care population in Washington County, Maryland. (App. 24, 26, 27).

REASONS FOR DENYING THE WRIT

THE PETITIONERS ARE NOT ENTITLED TO ANY RELIEF BECAUSE THERE IS NO CASE OR CONTROVERSY.

Review of this case is unwarranted because Petitioners have no discernable remedy and, therefore, cannot "satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy." City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (citing Flast v. Cohen, 392 U.S. 83, 94-101 (1968)). The case or controversy requirement demands that a plaintiff demonstrate "a personal stake in the outcome" of the case. Baker v. Carr, 369 U.S. 186, 204 (1962). Petitioners here have no such personal stake.

First, Petitioners must establish an injury or threat of injury that the outcome of this case would redress. This requirement is not satisfied by mere speculation that Petitioners may be injured in the future: "Abstract injury is not enough." Lyons, 461 U.S. at 101 (citations omitted). Nor is "a hypothetical threat . . . enough." Golden v. Zwickler, 394 U.S. 103, 110 (1969) (quoting United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 90 (1947)). Rather, the threat of future injury must be real and immediate at the time equitable relief issues. Golden, 394

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[3](...continued)
refused consistently to decide federal constitutional issues neither presented to nor decided by the lower court. Webb v. Webb, 451 U.S. 493, 498-99 (1981); Dothard v. Rawlinson, 433 U.S. 321, 323 n.1 (1977); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

U.S. at 109. See also Ashcroft v. Mattis, 431 U.S. 171 (1977). There must be a "'likelihood of substantial and immediate irreparable injury.'" Lyons, 461 U.S. at 111 (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)).

Petitioners' fear of future discrimination falls far short of establishing "a real and immediate threat of future injury by the defendant." Lyons, 461 U.S. at 107 n.8. Even assuming that Petitioners were wronged in this action, such "[p]ast exposure to illegal conduct," would not establish a threat of future harm. O'Shea, 414 U.S. at 495-96. This is particularly true, as the Maryland Court of Special Appeals found, in light of the provision of Maryland law prohibiting the exact conduct about which petitioners are complaining - the use of race as the sole factor in adoptive placements. Md. Fam. L. Code § 5-311(b)(2).[4] Further, there was no basis in the record to conclude that WCDSS had a "policy and practice" that it would follow in other cases to preclude transracial placements. (App. 56). Indeed, Petitioners' adoption of an African-American and a bi-racial foster child itself evidenced that the WCDSS had no such policy or practice. (App. 5).

Second, in order to establish a personal stake in the outcome of this case, Petitioners must show that the threatened injury is "likely to be redressed by a favorable judicial decision." Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990). Here, however, there is no discernable remedy available to Petitioners. Because Tiffany has already been adopted -- an act that Petitioners do not seek to have undone -- no court can redress their claim that they were her proper adoptive parents.

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[4] Section 5-311(b)(2) was "enacted to resolve situations in which potential adoptive parents request consent from a child placement agency and are rejected based solely on their race. . . ." (App. 16).

Nor are Petitioners entitled to monetary relief, because they filed suit against a State official in his official capacity. As a State official, sued only in his official capacity, Mr. Engle is not a person subject to suit under 42 U.S.C. § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Petitioners' attempt to sidestep this bar to monetary relief with the allegation that Mr. Engle was not acting in his State capacity "when he failed to apply the State law correctly but rather applied local policy" is, as the courts below found, "completely specious and without merit." (App. 53).

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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